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THE
LEGAL ADVISER;

OR,

HOW TO DIMINISH LOSSES, AVOID LAWSUITS,

AND

**SAVE TIME, TROUBLE, AND MONEY, BY CONDUCTING
BUSINESS ACCORDING TO LAW,**

AS EXPOUNDED BY THE

Best and Latest Authorities.

BY

EDWIN T. FREEDLEY,

AUTHOR OF "A PRACTICAL TREATISE ON BUSINESS," ETC.

PHILADELPHIA:
J. B. LIPPINCOTT & CO.,
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P R E F A C E.

Between two hawks, which flies the higher pitch,
Between two dogs, which hath the deeper mouth,
Between two blades, which hath the better temper,
Between two horses, which doth bear him best,
Between two girls, which hath the merrier eye,
I have, perhaps, some shallow spirit of judgment;
But in the nice, sharp quilllets of the Law,
Good faith! I am no wiser than a daw.

I. King Henry VI., Act II. Sc. IV.

It is inscribed on the corner-stone, and on the topmost spire of the vast Temple dedicated to Universal Justice, that "Ignorance of the Law excuseth no one;" but unfortunately it has not been authoritatively declared anywhere that the laws shall be written in a manner in which they can be clearly known and understood by every one of average understanding. On the contrary, it seems to have been the policy of its early founders to draw a thick veil of mystery over its most important principles; and even yet its nice, sharp points are fit exercise for the powers of those who can read unknown tongues, fatten on sawdust without butter, and see things that are not to be seen. Those who are less wonderfully endowed are practically debarred from learning any important number of its precepts except, as composure is said to be acquired, by buffetings and defeats; and business men in particular are frequently involved in

lawsuits by causes which a slight previous knowledge might have prevented. It may be possible for great merchants to regulate their important concerns by the advice of great lawyers: the neophyte in jurisprudence can, at a small cost, command the best services of the Kents and Storys and Parsons and Parkers of the land; but for traders and active men of moderate capital, it is impossible to have a solicitor constantly at their elbow, and there are but few, if any, books adapted to their pursuits, comprehension, and peculiar necessities. For them, however, some members of the legal profession consider a little learning as such a dangerous thing, that they stigmatize all attempts to prepare such books, as stepping beyond the limits of professional etiquette; and those properly qualified for the task, are restrained by a rule which, seemingly, would be more "honored in the breach than the observance." Regretting that a class of men, who are the prime agents in the world's progress, are thus left exposed to unnecessary hazards in addition to the ordinary risks of business, the author has ventured, with unaffected diffidence, to presume so far upon some years' study of the principles of Mercantile Law—a part of the time in the excellent Law School of the Harvard University—as to attempt to analyze the experience of our predecessors as recorded in the annals of courts, and from it deduce rules or suggestions that may enable some to avoid litigation, at least upon points already settled by other's litigation; or, if that be impossible, in gaining lawsuits by having the Law on their side. The results of his investigation are submitted under the title, suggested by the publishers, of "The Legal Adviser."

In all attempts to treat scientific subjects in a popular

manner there are formidable obstacles to be overcome ; but to popularise Law may be called an impossible enterprise, since we do not know of a writer who can be said to have entirely succeeded. The best elementary books—those which are placed first in a student's hands—cannot, it is generally admitted, be read with ease and pleasure, nor be perfectly comprehended, except by those who are already good lawyers ; while the others are so elementary, not to say inaccurate, as not to convey much practical information. Among the least of the difficulties by which an attempt to compress many important Law points in a convenient compass is embarrassed, we might mention the uncertainty with regard to the amount of legal information, it may safely be assumed, that every one possesses. Luther Martin did not consider it safe to assume any thing upon this point, even as respects the Supreme Court of the United States, and therefore, on a certain occasion, occupied the attention of that Court for two whole days in elucidating elementary principles of Law ; but on the morning of the third day, Chief Justice Marshall interrupted him, and said : “ Mr. Martin, it must be presumed that this Court knows *something*.” The chief difficulty, however, is to determine, in a Union composed of many sovereign States, whose courts are independent of each other, and jealous of their independence, what principles are recognized and enforced in all, or in so many of them as to be called principles of general application. American Law, unfortunately, is a misnomer. New Jersey Law, Texas Law, Black and Blue Laws, Martial Law, and Lynch Law, have an existence, but American Law is an agreeable fiction. Legislatures and Courts alike have contributed in this re-

spect to make "confusion worse confounded." The former, in the futile attempt to patch old garments with new material, have, by express and positive enactments, rendered inoperative within their limits, not only many of the established principles of the Common Law, the decisions of the highest courts in the neighboring States, but the decisions of the Supreme Court of the United States; and what they have left untouched, the courts have modified and qualified, and obscured by exceptions to exceptions, until the Reports are no longer "beacons and landmarks to guide the public into quiet havens of security and repose," but false lights to decoy into the whirls and shoals of litigation. In matters of mere local interest and private rights, dissimilarity in the Laws of the several States, inasmuch as the habits and civilization of the people are dissimilar, is perhaps desirable; but for the advancement and safety of commercial intercourse, uniformity in commercial regulations is of the first importance, and "all things that are to be desired, are not to be compared to it." In an age when Conventions are held to consider all sorts of grievances and evils, it is as remarkable that none have been called to devise a remedy for the evils resulting from discordant and conflicting Commercial Laws; as it is certain that the authors of a wise and convenient Code, which shall be adopted by all the States composing this Union—not to mention the commercial countries of Europe—will enrol their names among those whom a grateful people delight to honor. But until this is accomplished, we are left in the position of mariners compelled to correct their reckoning by frequent observations; and the writer who attempts to enlighten us, may congratulate himself if he escape the

critics and the lawyers as fortunately as Blackstone did, to whose Commentaries they objected nothing more than—that every page contained at least one false principle and two doubtful principles stated as undoubted law.

In view of these and other difficulties, the Author laid aside this undertaking, and would have abandoned it; but recollecting, within his own limited experience, two instances in which considerable sums of money were lost by the neglect of precautions, which in these pages do not occupy more than a dozen lines, he has hoped by the publication to effect something for the benefit of those whose courtesy has made him their debtor. He was further encouraged by the anecdote of a farmer, to whom a little legal advice was of great advantage. Having a spare guinea, he had called upon an attorney and solicited his advice to that amount, without specifying object or occasion. The lawyer enclosed a line in a sealed envelope, and did not refuse the guinea. In harvest time a doubt and consultation arose as to the propriety of taking in a certain crop on that day or deferring it; and the farmer perceiving that to be the emergency for which he had provided himself, very properly referred to his attorney's opinion, and read, "Put not off till to-morrow what you can do to-day." This settled the difficulty. The crop was immediately put under shelter, and the farmer's sagacity established, for on the morrow a flood came which destroyed the crops of his less sagacious neighbors. What wisdom in the scriptural injunction, "Do nothing *without advice*; and when thou hast once done, repent not."

It may be proper for the Author to use this opportunity to explain further, that he has taken an observation of Mercantile Law as he believes from a new point of view. He

has consulted the records of decided cases, not as lawyers and jurists do, to discover what points of Law are established by the decision, but what reflections the case may suggest, likely to be of practical value in solving doubts and preventing disputes and entanglements in business intercourse. I have endeavored to adhere to principles that are well established, avoiding the "fathomless and unquiet deeps" of controversy, and where the Laws conflict, I have sought to recommend that practice which will be *safe*, though not always convenient, in every State in the Union. It is not proposed to aid in making "Every man his own Lawyer :—" on the contrary, it is desired to infuse habits of caution and circumspection, and render the unskilled less bold in attempting themselves what can only be well done by one skilled in the Law. In stating Law points, I have adopted, in many instances, the language of standard Law writers, entire, or with slight modifications; but in general, Law points are subordinate, though auxiliary, to suggestions designed to point out what is safe and what is unsafe in ordinary Business Tactics, or to precautions intended to protect the honest against the artful designs of the crafty.

May then this Legal Adviser, imperfect as it is, be at least as potent as the attorney's opinion to the farmer, in aiding good men to treasure up a harvest of good things.

Philadelphia, 1857.

E. T. F.

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Text Books Quoted.

[As this book was prepared for unprofessional readers who have not convenient access to many bulky law volumes, it was not deemed necessary to burden the text by frequent citation of authorities; but in the following works, the most of them Text books in the Law School of Harvard University, authorities are cited and commented upon, that will confirm, the Author thinks, the Points stated as Law in the following pages.]

KENT'S COMMENTARIES.
STORY ON AGENCY.
STORY ON PARTNERSHIP.
BOUVIER'S INSTITUTES.
PARSONS ON CONTRACTS.
LONG ON SALES.
STORY ON SALES.
PITMAN ON PRINCIPAL AND SURETY.
MARSHALL ON INSURANCE.
STORY ON PROMISSORY NOTES.
STORY ON EQUITY JURISPRUDENCE.
GREENLEAF ON EVIDENCE.
BURRILL ON ASSIGNMENTS.
JARMAN ON WILLS.

&c. &c. &c

THE LEGAL ADVISER.

CHAPTER I.

LAW, LAWYERS, AND LAWSUITS.

"Though there can be neither thrift nor safety in a man's attempting to practice Law for himself, any more than in attempting to practice physic for himself; yet, just as a knowledge of the general rules for the preservation of health, of the simpler remedies and processes of the medical art, and an insight into the peculiarities of one's own constitution are of importance to every one; in like manner, no man of business can fail to find his account in learning the general principles of Law, and the particular rules which relate to his own line of life."—DAVID R. JACQUES.

THE Law, in its ordinary and circumscribed sense, is a collection of rules prescribed for the regulation of human actions. The term applies particularly to those rules which are of general application, and which can be enforced and vindicated by inflicting penalties for disobeying them. The chief object in establishing laws is to define rights, or, in other words, to maintain order by giving every one what is his due. In a primitive state of society, the rules necessary to attain this end are few and simple; but as society, in its progress, becomes complex, the laws must multiply and change in conformity with the increasing diversity of men's actions and pursuits. Those laws only which the

Sovereign of the Universe has prescribed in nature and revelation, are adapted to all men, all states of being, and all countries, and consequently they only are immutable. All other laws are inferior to them in relative rank and binding obligation; and though some have presumed, unthinkingly perhaps, to sneer at laws higher than a people's Constitution, it is a fundamental principle in the jurisprudence of all Christian countries, that no human laws are valid if opposed to a divine law. The maxim is, when contrary laws come in question, the inferior must yield to the superior, the law general to the law special, an old law to a new law, but man's laws to God's laws.

The Law, when viewed through the kaleidoscope of abstract principles, presents a system of such unsurpassed beauty, as to have called forth unbounded eulogies from the loftiest intellects. Burke has called Law the pride of the human intellect, the collected reason of ages, combining the principles of original justice with the infinite variety of human affairs. "Of Law," the eloquent Hooker has said, "her seat is the bosom of God: her voice the harmony of the world—all things in Heaven and earth do her homage; the very least as feeling her care, and the greatest as not exempted from her power—angels and men, creatures of every condition, though each in different sort and manner, yet all with uniform consent admiring her as the mother of their peace and joy." But, on the other hand, the Law, when regarded through the mists of prejudice or personal interest, has not escaped unsparing sarcasm and reproach. Suitors wearied

with a fruitless attendance at her courts, or whose rights have been sacrificed on the altar of Precedent, have not been able to see any beauty in her face nor symmetry in her form; and as to her disposition, they say with the rejected lover, "if she be not kind to me, what care I how kind she be." The only poetry applicable to Law, which unfortunate suitors recognize as perfect in sentiment and metre, is the epigram of one of their number:

"This Law, they say, great Nature's chain connects,
That *causes* ever must produce *effects*;
In me, behold revers'd great Nature's Laws,
All my effects lost in a single *cause*."

Or that old song, which says:

"If you're fond of pure vexation,
Latin, and botheration,
You're just in a situation,
To enjoy a suit at Law."

But, whether human laws be the "perfection of reason," or whether, as is probable, they be tinged with human infirmity, they are not only our safeguards in society, defining and protecting our rights, but our chosen sovereign, commanding what shall be done and what shall not be done; and as ignorance is never admitted as a justification of their transgression, it behooves every one—the poor and the rich, the merchant, farmer, and the mechanic, as well as the property-holder, to become familiar with their leading principles, if not learned in their mysteries.

It is fortunate, therefore, in view of its essential importance, that it is now not difficult to acquire such a knowledge of the principles of Law as may protect from gross imposition, and serve a useful purpose in the ordinary affairs of life. The Law is a science; and, though not ranked among the seven liberal branches of knowledge, it can be studied with equal interest, and as little difficulty.

At one time, it is true, it was doubted whether its principles were susceptible of such systematic arrangement, as to be conveniently taught, easily remembered, and readily applied; and less than a century ago this doubt rested on a substantial basis. The aim and pride of the early writers on Law seem to have been rather to obscure, perplex, and mystify, than to simplify and enlighten. The language which they used, like the mysteries of ancient divinities, could be understood only by the initiated votaries; and the result was, that the Law became as a cavern into which an explorer could penetrate only at the risk of being precipitated down precipices, or stifled by noxious gases. Its facts were then disconnected, its principles disjointed, and its whole exterior so unprepossessing, that some who subsequently became its great masters, acknowledged that at first they had an almost unconquerable aversion to its study. But the genius of modern jurists has removed the most serious difficulties in the student's pathway; and now any one of average abilities may master its elements, and, according to Fortescue, "when you shall become acquainted with the principles and elements of the Law, you may be denominated a lawyer." Ele-

mentary Law books abound distinguished alike for elegance, perspicuity, and simplicity of style and accuracy of information; and the remark which has been made respecting religion, that "though the elephant may swim, yet the lamb can wade in it," is now, to a great degree, also true of the Law.

As a *profession*, the Law, though a favorite object of youthful and feminine ambition, has, so far as we can see, but few advantages over other means of obtaining a livelihood. In the outset of his career the young practitioner must frequently endure the pangs of "hope deferred" for a long period; and in the noontide of success his life is an alternation of excitement and exhaustion—of fierce contention in the forum and unremitted application in the study. The pecuniary reward of Lawyers, too, are not proportioned to the attainments and labor necessary for the conscientious discharge of their professional duties. Though it be true, as has been vauntingly stated, that the people of the United States pay their Lawyers \$30,000,000 annually, this would prove that the average earnings of each member of the profession do not exceed \$1,000 per annum—and, as the earnings of a few are known to exceed this largely, it further proves that though there may be some prizes, there must be many blanks. Also, in their relations with clients and the public, the Lawyers have several well-founded causes of complaint, to one or two of which we will advert. One is, their abilities are estimated by an impossible standard, and because they profess to practice Law they are presumed to know all the laws. Consequently, a class of clients lead their professional advisers

into temptation without delivering them from evil, by pressing them to give opinions without hesitation upon any legal questions they may see proper to propound, under penalty of being lightly spoken of, if time is solicited for consideration and investigation. Such men, probably, do not know that in a moderate Law Library of 500 volumes, there are not less than 2,625,000 law points stated—Mr. Park asserts, that his Treatise on *Merger* contains at least *three thousand* propositions upon subjects of every day occurrence—and consequently, they do not reflect that it is mentally and physically impossible for any one, however diligent, to master the fourth of them. Even George III., obstinate as he usually was, admitted its impossibility when he said, “I have had occasion to consult the best Lawyers in my dominions, and not a man of them can do more than refer.” Clients who demand “off-hand” opinions upon legal points, or who choose Lawyers because they are ready in their conclusions, should at least not complain when they are misled by erroneous impressions, or if they act upon disastrous advice.

Another complaint which the Lawyers may make is, that their integrity is regarded with a suspicion amounting even to a popular prejudice against the profession. But they can console themselves by reflecting that this prejudice, whatever may have been its foundation, has been more detrimental in its consequences to society in general than to the legal profession. It affects in some degree, it is true, the communication between clients and their attorneys by substituting suspicion for con-

fidence; but its worst consequences are, that it induces many persons to attempt themselves what can only be well done by one skilled in the Law, and thereby frequently produces irremediable embarrassments in their affairs. To such an extent have individuals been misled by its influence as to introduce clauses into their wills, directing that no Lawyer shall be employed in any affairs relating to the settlement of their estates. The result in many of these cases has been, as might have been foreseen, that Lawyers have eventually reaped the chief profit, and not unfrequently estates have gone directly contrary to the supposed intention of testators. It is, therefore, neither wise nor politic for us to aid in, or encourage the diffusion of a prejudice against a profession which is as indispensable as the medical or mercantile profession. That there have been ignorant and dishonest Lawyers, no one has ever been rash enough to deny. That slow and lazy Lawyers may be found even now, is a possibility that, we fear, can be established.*

* Mr. Birney, of Cincinnati, seems to have been remarkably successful in his researches to establish this fact, as will be inferred from the following amusing record of his experiences, given through the *Philadelphia Register*, of which he was editor.

"We not only respect lawyers, but have a lively admiration for them. Who ever heard of one of them taking a fee in an unjust cause? or doing a hard-hearted thing? or saying what he did not believe? or encouraging litigation? or misrepresenting evidence to the jury? or brow-beating a modest witness? or saving a villain by a legal quibble? De Tocqueville rightly says they are the aristocracy, that is, the best men of the United States. Our own admiration of them is founded on a large experience of their virtues. Let us call up, for a moment, from

But as some one has remarked, "to decide upon a picture, by the imperfections which appear in the

our pleasant memories of the past, the images of a few lawyers of our acquaintance.

"There is our friend at Columbus, Mississippi, who never varies from his scale of charges, even for friends. We sent him once for collection, a bill of nine dollars against a subscriber. He collected it the same day, and sent us, by return mail, his own bill for a fee of fifteen dollars, with a polite dun for the unpaid balance of six. We remitted *instantly*, thanking him for his promptness.

"Then, there is the eminent counselor, at Lake Providence, who charged us two hundred dollars on a bill of exchange for two thousand, which had been paid on presentation. We remonstrated, and he consoled us for not having collected through a bank, by the assurance, that if professional etiquette did not forbid, he would certainly reduce his original charge, which he was kind enough to admit was rather too heavy.

"A still better man was a Texas lawyer, to whom we entrusted a disputed land claim on an arrangement called the 'halves,' very common in that part of the country. A facetious dog was Smith. About eighteen months elapsed without our hearing from him. He then wrote us, in answer to our twentieth epistle, that he had done remarkably well with the claim, having compromised it for half the value of the property; that he had pocketed the half for his fee; and that we were really not indebted to him any thing besides the costs of a suit he had commenced and discontinued. We could have fairly hugged the fellow for his gay and careless humor.

"He did not give us half the trouble we had with a lawyer out at Jefferson city, who had collected for us a claim of several hundred. Punctual as a correspondent, he advised us, by the first mail of the receipt of the money, adding that the mails were made very irregular by the overflowing of the river, and he did not think it safe to remit. We waited until summer time, until one could almost wade the Missouri. The river was so low then, he said, he found it extremely inconvenient to get his paper to the bank where he usually had it cashed. Two seasons passed

background, without reference to the points which are boldly and brilliantly displayed in the fore-

by, and innumerable letters were interchanged in regard to remitting, droughts, and inundations. At last, being in need of funds, we wrote that we must insist on having the money, irrespective of the state of the water. He was an honest creature at heart, and sent it, forgetting to add the two years' interest, but deducting twelve per cent. for his fee.

"Lawyers will be a little lazy sometimes; but can we blame a man for physical inaptness for activity? The laziest one we ever knew lived at Shawneetown, Illinois. He had promised, for a year or two, to remit to Louisville some money he had collected for us. Business-like demands, cajolery, persuasion, argument and menace had no effect on him. He would write no more. At last, we sent him in full the anecdote of the man who was so lazy that he eat apples off the tree, not being energetic enough to raise his hand to pluck them. This touched the right spot, and he roused himself so far as to send us the money. The effort may have killed him; for we have never heard of him since.

"In no profession is there a more chivalrous sense of honor than in that of the law. We have a lively remembrance of having long been kept in constant bodily fear by a lawyer of Little Rock, Arkansas. He had maintained a most obstinate silence for more than a year after receiving for us the full amount of a claim. To a letter in which we demanded an immediate and satisfactory adjustment of the matter, he answered that our former letters were too Yankee-like, but he was ready to give us satisfaction at once; he ended by requesting us to name our friend and weapons, as he would come on and fight us on our own ground. We wrote him, by return post, to put a Pickwickian construction on the offensive letter. After applying to some forty lawyers to collect the claim from our belligerent attorney—all of them refusing the business on the plea of professional delicacy—we succeeded in retaining one, on a promise of twenty per cent. As the warlike one's charge was twelve, sixty-eight per cent. was all that ever came into our possession.

"The New York lawyers are noble and dashing practitioners. Marmion never charged more spiritedly. It was only the other

ground, can only be attributed to a state of feeling which, to say the least of it, amounts to an absolute predetermination to deny every exhibition of excellence, however surpassing." Among the vices of the profession infidelity to the interests of clients is the least common; and in every community there are Lawyers of honor, and honesty, and learning, whom it is a wise economy to employ, not only to conduct or defend Lawsuits, but to prevent them.*

But if the Law were an abstract science, or if its rules were only those which need be known by practicing Lawyers, we should not presume to approach the outer gates of its temple. Fortunately, among its rules are a number designed to promote fair dealing and justice in ordinary commerce, and many of its maxims are also maxims of commercial wisdom. These we propose to consider by the light of established decisions, and endeavor to ascertain from them the path of safety in the trans-

day one of them sent us a bill of sixty dollars for seeing to a deposition of a few lines to prove the style of a firm, adding that he would retain the deposition until the bill was paid. We hope he will find it good property; we paid five for taking another."

* Lawyer, or Advocate, is the *nomen generalissimum* for all legal practitioners. In the profession, however, they are distinguished according to the courts in which they are admitted to practice—those practicing in the Common Law courts being known as *Attorneys*: in the Courts of Equity, as *Solicitors*: in the Courts of Admiralty, *Proctors*: in the Supreme Court of the United States, as *Counselors*—no person being permitted in that court to practice as both Attorney-at-Law and Counselor-at-Law. It is the duty of the former to prepare the causes for trial, and of the latter to argue them.

actions and complications of business. First, however, let us glance at the classification of laws.

Laws are usually divided, by the writers on Law, into three principal kinds. 1. Natural Law. 2. The Law of Nations. 3. The Municipal Law.

1. The *Natural Law*, or the *Law of Nature*, is the will of God, manifested either by direct revelation, or capable of being known by the exercise of our moral perception, which is an original and important part of the human constitution. This is the supreme Law in all lands.

2. The *Law of Nations* has been defined to be a system of rules deducible by human reason from the immutable principles of natural justice, and established by universal consent among the civilized nations of the earth, in order to decide all disputes, and to insure the observance of good faith and justice in that intercourse which must frequently occur between them, or it depends upon mutual compacts, treaties, leagues, and agreements between separate, free, and independent communities.

The various sources and evidence of the Law of Nations are the following. 1. The rules of conduct, deducible by reason from the nature of society, existing among independent States, which ought to be observed among nations. 2. The adjudication of international tribunals, such as prize courts and boards of arbitration. 3. Text writers of authority. 4. Ordinances or laws of particular States, prescribing rules of conduct for their commissioned cruisers and prize tribunals. 5. The history of the wars, negotiations, treaties of peace, and other matters relating to the intercourse of nations.

6. Treaties of peace, alliance, and commerce, declaring and modifying, or defining pre-existing international law.

3. *Municipal* law is defined to be a rule of civil conduct prescribed by the supreme power of a State. It is usually subdivided by law writers into two kinds—*written* and *unwritten* Law, or *Statute* and *Common* Law. The *Statute Laws* of the United States consist of the Constitution of the United States; the acts passed by the Congress of the United States; the Constitutions of the several States; the acts passed by the Legislatures of the several States since their organization; and the treaties made with foreign governments under the authority of the United States. The *Constitution of the United States* is the supreme law of the land, and any law made in contravention of the requisitions of the Constitution is for that reason *ipso facto* void.

The *Common Law* is the technical name for all those principles, usages, and rules of action for the government and security of person and property, which do not rest for their authority upon any express and positive legislative enactments. A *custom*, which has been generally observed from a time "whereof the memory of man runneth not to the contrary," may be called a part of the Common Law. A maxim, which has received the sanction of courts from time immemorial, as expressing a sound and true principle of general application, is a part of the Common Law; and at the present time, the whole superstructure of legal science rests upon

certain maxims, which are more particularly distinguished as fundamental legal principles.

1. One of these fundamental maxims of the Common Law is—*there is no wrong without a remedy*. If a man have a right, it was observed in a celebrated case, he must have a means to vindicate and maintain it, and a remedy if he be injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. As a consequence then, the novelty of a particular complaint is no objection, provided it be shown that an injury cognizable by the law has been inflicted; for, in such case, although there be no precedent, the Common Law will judge according to the Law of Nature and the public good. We would err grievously, however, in supposing that therefore the law provides a remedy for all sorts and classes of injuries; for if it did, the prospects of the profession would be materially improved, inasmuch as every one who suffers damage in loss of custom or otherwise, by the erection of a rival establishment, whether a store, or school, or mill, would have a right of action therefor. A person too may debar himself of a remedy for a wrong, by consenting or contributing to that which occasions him damage. A husband who consents to his wife's adultery, cannot maintain an action for criminal conversation. A merchant who assents that his goods shall be loaded on the deck of a vessel, manifestly an improper and unsafe place, can have no remedy against the master or shipowner for a wrongful loading of the goods. The maxim which

we have stated is further qualified by that principle, founded on public policy—*the good of the individual must yield to that of the community*, which justifies, for instance, the pulling down of a private house in order to arrest the progress of a general conflagration. The maxim, therefore, seems to imply but little more than, that which is without remedy is not a legal wrong.

2. Another fundamental principle of the Common Law is, that *an act of God shall affect no one injuriously*. This may seem a paradox, when we reflect that the most direct manifestations of God's presence and power, as storms, tempests, earthquakes, and lightning, frequently do immense and irreparable injury to person and property; but the maxim, as a rule of law, means simply that accidents which are inevitable, shall not be construed to the prejudice of one in whom, as it is expressed, there is no "laches." A man disabled, by act of God, from performing his contract or discharging a duty, shall not be compelled to suffer therefor by act of law. Thus a common carrier, who has agreed to convey and deliver goods "in good order and condition," to a certain place, but is prevented from doing so by storms or the like, is excused from his contract, and the owner must bear the loss. Analogous to the maxim above cited is that other, which says *the law does not seek to compel a man to do impossibilities*. Hence if a bond be given, conditioned to do any thing which is possible at the time of making it, but afterward becomes impossible from unavoidable causes, as to marry a young lady who dies before the day of marriage, the obligor is excused;

but if a man give a bond, conditioned to do a thing impossible at the time of making it, it is said the condition alone is void, and the bond shall stand single and unconditional. But in giving obligations, or entering into contracts, it is never safe to trust entirely to the benignity of the law. It is always politic to provide *expressly* against contingencies, and exempt ourselves from responsibility in certain events, for it has been held in many instances to have been the party's own fault and folly in binding himself absolutely to do an act which he was prevented from executing by inevitable accident or other contingency, which he should have foreseen and excepted, and therefore he was liable in damages for non-performance. The maxims are applied more generally in cases where *the law has created a duty or charge*, which we are disabled from performing, and without any default on our part.

3. Another maxim is, that *ignorance of a material fact may excuse, but ignorance of the law cannot excuse a party from the legal consequences of his conduct*. The former part of this maxim is frequently relied upon in cases where money has been paid under a mistake of facts; and generally if money be paid to a wrong party, or under an impression of a fact which is untrue, or through a *bona fide* forgetfulness of facts, it may be recovered back as money had and received; but money paid with a full knowledge of the facts, but through ignorance of the law as to our liability, cannot be recovered back, if it be not against conscience for the party to retain it. A man who pays a debt that would have been barred by the statute of limitations, or the plea of

infancy, cannot in law, as he ought not in conscience, maintain an action to recover the money again, when he discovers that he paid it without being legally liable for the debt. Every one is presumed to know the law, and a mistake in point of law, especially in criminal cases, is no sort of defence. If it were otherwise, ignorance would amount to legal exemption, and it would indeed be "folly to be wise."

4. Again, the Common Law has adopted, as one of its fundamental principles, the maxim that *the public good requires there must be an end of litigation*. In civil cases, after a final judgment obtained in a court of competent jurisdiction, neither of the parties to a suit can reopen the matter in dispute by commencing another action upon it. The previous decision is regarded as conclusive between the same parties. Even where money has been paid under compulsion of legal process, but as subsequently discovered wrongfully, it cannot as a general rule be recovered back; and consequently, men who have been compelled to pay bills which they had previously paid, but mislaid the receipt, have not been permitted, on subsequently discovering the receipt, to recover again the sum so wrongfully enforced, as money had and received. Hard cases, it has been frequently observed, are apt to introduce bad laws. In criminal cases, the established rule is that where a person has been indicted for an offence, and acquitted, he cannot afterward be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted upon it, by proof of

the facts contained in the second indictment. No man, it is humanely considered, ought to be put in danger of legal penalties more than once upon the same accusation. The Constitution of the United States has borrowed from the Common Law the provision, "nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb."

5. With regard to *crime*, the Common Law has adopted the principle of natural justice, that *the intent and the act must concur to constitute a crime*. A criminal intent, even though expressed in words, gestures, or otherwise, without proceeding to the crime to which it points, is not indictable as the crime itself; and an act, however evil in its consequences, done without criminal intent, is not a crime. For instance, if a man, intending to kill a thief or a housebreaker in his own house, under circumstances which would justify him in so doing, kill one of his own family by mistake; this is not a criminal act, because the criminal intention is wanting. Persons who are under a natural disability of distinguishing between good and evil, as idiots, lunatics, and persons of immature years, are not punishable for a like reason by any criminal proceeding; and "if one who has committed a capital offence becomes *non compos* before conviction, he shall not be convicted—and if after conviction, he shall not be executed." An infant within seven years of age is incapable of committing a felony, because the Law presumes he has no discretion, and it will not allow any proof to overturn this presumption. Between the ages of seven and fourteen years, an infant is *prima facie*

incapable of committing a crime; but this presumption may be rebutted "by strong and pregnant evidence of a mischievous discretion." An infant above fourteen years of age is subject to the same rules of construction as those of a more mature age.

Though the rule be inflexible that, to constitute a crime, the intent and the act must concur, we must not infer that both need in all cases be proved. The intent is in general proved when the overt acts are proved, because every man is *prima facie* supposed to intend the necessary consequences of his own acts; or in other words, if an act, manifestly unlawful and dangerous, be done deliberately, the mischievous intent will be inferred unless the contrary be shown. If a man lay a poisoned apple, or fire a pistol intending to kill A., but B. is killed—this nevertheless amounts to murder. Outward acts, it is said, indicate the secret intentions.

6. With respect to *property*, the Common Law has a loving fancy and a tender regard for land, which it distinguishes as *real* property, as if money, stocks, bonds, merchandise and the like, were unreal and fictitious property. It enunciates, as one of its fundamental principles, that *the owner of the soil has an exclusive right to it from the centre of the earth even to the skies*, and consequently he may build as high and dig as deep as his heart desires and means allow. It gives to the owner of the soil the minerals that he may discover by digging beneath it, and the buildings which another, without his consent, may have erected upon it. It says that whatever is affixed to the soil belongs thereto—a maxim

which is the foundation of the strict law of "fixtures;" but which modern decisions, for the benefit of trade, have materially qualified and relaxed. It holds that *every man's house is his castle*, and consequently in defence of his house the owner, or those within its doors, may justifiably kill any one who wickedly attempts to destroy it, or break into it, or forcibly dispossess him of it. It forbids even an officer of the law to break open the outer door to serve any process, writ, or execution, except where a felony or misdemeanor has been committed, and then only after stating the cause of his coming, and desiring admission. It however enjoins upon every one *so to enjoy or use his own property as not to injure that of another*—*sic utere tuo ut alienum non lædas*—a maxim that will, it has been observed, generally serve as a clue to the labyrinth when different rights happen to clash. Such and so universal are the fundamental principles of the Common Law of England on which our Common Law is chiefly based. The applications which are made of them, and the minor rules that are deduced from them, can, if necessary, be more appropriately considered in another place than in an introductory chapter.

The branch of the Common Law, however, to which we propose to devote our particular attention as the basis of our exploration for a system of business tactics, is that which is distinguished as Commercial Law. Its foundations rest mainly upon the usages which merchants established for the regulation of their dealings throughout the civilized world, and which have from time to time received the sanction of courts. The customs of merchants are referred to as early as the time of Abraham,

who purchased the cave of Machpelah for "four hundred shekels of silver, current money with the merchant;" but their judicial recognition as a part of the Common Law is of modern origin, and it is mainly ascribed to the enlightened understanding of Lord Mansfield, who is called the father of Commercial Law. The rules composing the system were necessarily at first few, simple, and very general; but to adapt them to an ever-varying combination of circumstances in the progress of society, it was found necessary to limit, qualify, and again extend them, until now the Code Commercial is distinguished from the other branches of the Common Law rather for its flexibility than for its simplicity.

In the United States, the difficulty which most embarrasses philosophical jurists and advising counselors, is the want of uniformity among the Commercial Laws of the different States. The adoption of the means necessary to secure a debt, for instance, in one State, may in another be the cause of losing it. This is truly a serious evil, deserving, if practicable, an immediate remedy. But, though our aim is widely different from those who treat of Law as a science, or practice it as a profession, we shall hold the conflict of legislation in view as a spur to the discovery of more comprehensive rules than would otherwise be necessary in the conduct of civil affairs. In our suggestions we shall consult safety rather than convenience. In our researches we shall seek not that which the Law within prescribed limits may possibly allow, but that which it will undoubtedly sanction wherever the Commercial Code is a recognized branch of jurisprudence. Millions of dollars have been expended by our an-

cestors in establishing and elucidating certain legal principles of constant application—not less than a half million of dollars, it has been estimated, have been spent in explaining one section of one statute—the Statute of Frauds—and it is reasonable to hope and believe, that now, with the lamp of others' experience in our hands, we may discern what to do and what to avoid in ordinary commerce, and thus either escape the perils of litigation altogether, or if collisions must come, be armed for the contest with the "Law on our side."

The subjects to which we propose to confine our inquiries are those which are likely to be of the greatest interest to the greatest number. The plan will necessarily preclude any consideration of the means to be employed in enforcing rights and redressing wrongs, or doing any other act which cannot be done well except by one skilled in the Law. In instituting or defending suits, transferring real property and the like, we have but one suggestion to make—and that is, *employ an attorney*, and "select one," in the language of Bouvier, "not a mere lawyer, but a man of known high character as to honor and honesty, as well as for his knowledge of all his professional duties, and also of adequate knowledge of the world and a good negotiator: *one who is disposed to avoid litigation, and above all, one who has not any connection with the expected adversary.*" And, before commencing an action, it will be well to consider whether you have "a good cause, a good purse, a good counsel, a good judge, a good jury, and good luck." These, in the opinion of an experienced ~~but~~ *retired* barrister, are the prerequisites for success.

CHAPTER II.

AGENCY.

SUGGESTIONS FOR GENERAL AND SPECIAL AGENTS, AUCTIONEERS, BROKERS, COMMISSION MERCHANTS—THEIR PRINCIPALS, AND PERSONS DEALING WITH THEM.

THE outline of the personal history of men who are distinguished for mercantile success is, so far as known, remarkably simple and uniform. With scarcely an exception, they have been the architects of their fortunes. It is rare to discover one who in early life was nursed on the lap of luxury, or placed in a commanding position by friendly assistance. The outline of the story usually is, that the future favorite of fortune, having graduated at a country school, sought and obtained, without the aid of any letters of recommendation, except his honest countenance and healthy body, a situation as clerk or agent in some commercial centre. Diligent in the acquisition of knowledge and faithful in the discharge of duties within a circumscribed sphere, he was gradually entrusted with a wider range of discretionary powers; and after having satisfactorily filled the position of supercargo, cashier, or general agent, he "either set up to do business" for himself, or became the partner of his employer, or some other person needing his services. At all events, if we

analyze the causes of their prosperity, we shall generally find its germ in the ability and fidelity with which they discharged the duties implied in the relation of Agency. The legal principles applicable to this relation, therefore naturally come first in the order of subjects for consideration, and their importance in the present complexity of human affairs, when every man is called upon, more or less frequently, either to act as agent in some matter for another, or to appoint another to act for him, must be obvious to all.

Agencies are commonly distinguished as of two kinds, general and special. By a *General Agent*, is meant, one appointed to transact all his principal's business, or all his business of a particular kind. A *Special Agent* is constituted for a particular purpose, and acts under a limited and circumscribed authority.

Auctioneers, Brokers, Factors, or, as they are usually called in this country, Commission Merchants, are the principal classes of commercial agents. An *Auctioneer*, is a person authorized to sell goods or property at public auction, for a commission. Before the knocking down, he is exclusively agent of the seller; but after this he becomes also the agent of the purchaser, and the latter is presumed to give him authority, to write down his name as purchaser. The memorandum, so made, will bind both parties. A bid, however, is considered in the law, as a mere offer, and may be retracted at any time, before the knocking down, which signifies acceptance.

A *Broker* is an agent employed to negotiate

between other parties, and he is presumed to act not in his own name, but in the names of those who employ him. Hence, if he sell the goods of his principal, in his own name, without some special authority, inasmuch as he exceeds proper authority, the principal will have the same rights and remedies as if the name had been disclosed. The purchaser in such a case, cannot set off a debt due him from the broker, against the claim of the principal. A *Factor, or Commission Merchant*, is an agent employed to sell goods consigned, or delivered him, by or for his principal, for a commission. A factor may buy and sell in his own name, as well as in the name of his principal. He is distinguished from a broker by the fact, that he has possession of the goods; and when the latter has possession of what he is employed to sell, or is empowered to obtain possession of what he buys, he is in these cases properly a factor.

Attorneys are agents, admitted by the courts to appear and act in behalf of the suitors, by whom they are retained. They are responsible to their clients for any injuries sustained by the latter, in consequence of their negligence or incompetence, and being officers of the courts, they may be punished in a summary way, by attachment, or by being debarred, for failing to pay over money collected by them, or for any other wrongful, fraudulent and corrupt practices. In the prosecution or defence of a suit at law, an attorney has a wide range of discretionary authority, and may compel or dispense with the pleas, testimony, &c., of the opposite party at his pleasure, but ordinarily he must pursue the

strict line of his duty, or his acts will not bind his client. If he receive "a note or debt to collect, he must take the proper legal means to collect it, according to its purport. If it be payable in money, he can receive money only, unless he be specially directed otherwise : and if he agree with the debtor to take a new note, or to receive other property in payment, or to compromise for a less sum than is due without the knowlege or consent of his client, such an agreement will not be binding on the latter, and he may disregard it."

The authority of an Agent may be created *by deed under seal, or by writing without seal, or verbally*. Where the object of the agency is to convey real estate or any interest in land, the appointment must be by deed, but ordinarily verbal authority is sufficient. An Agent, however, should always demand an authority *in writing*, as evidence of his appointment ; for he is personally responsible that he is authorized to do such acts as he professes to execute. In some cases the relation of principal and Agent may be established by *circumstances*, as from the nature of the employment, without proof of express appointment. Hence our suggestions are :

First. *Be cautious in sanctioning acts done by another in your name without authority, even if they are apparently insignificant or to your advantage.*

Permitting a man to act as Agent, and repeatedly adopting such acts, confers an implied authority, and justifies the public in supposing him to be an authorized Agent. A case is recorded where a confidential clerk having been accustomed to draw checks in his principal's name, and occasionally per-

mitted to indorse for him, the jury were held warranted in finding a general authority to indorse. So if you send a servant to a store to buy goods on credit and you afterward pay for them, you will be answerable for the goods he may subsequently buy there on credit, even though you may have given him the money to pay for them.

When a clerk, who has been empowered to draw or accept bills in his employer's name, leaves his service, it is always prudent for the latter to give express notice of the fact to all his correspondents, individually, for otherwise he may be bound by the subsequent acts of such clerk. A general notice in a newspaper is not sufficient to affect a former customer—the law requires an express notice.

2. *In the appointment of a General Agent, take particular care whom you authorize, for an error may be of fatal consequence.*

By appointing a man his *General Agent*, the principal publicly declares and proclaims that he will be bound by all the Agent's acts done within the usual and ordinary scope of the business to be transacted, whether he exceed his private instructions or not.

The law regards the acts of the Agent as the acts of the principal, and presumes that the principal knows whatever is known to the Agent. Commission Merchants are General Agents: hence the caution given in the old maxim, "Let a man take heed what factor he makes." A known factor can bind a principal by all purchases or sales as factor, whether he has ever been employed before by the same principal in the same direction or not, and such power

cannot be limited by private instructions with which persons dealing with the factor are not acquainted. "Whenever it is proved that A. is Agent of B., whatever A. *does, or says, or writes* within the scope of his general authority *at the time* of making the contract, binds B." A principal is bound by the concealment of any material fact on the part of his General Agent as well as by his open declarations and admissions. If a cargo of goods be consigned to a Commission Merchant with instructions to make an insurance thereon, and he conceal any material fact, the underwriters will be discharged: and if a factor sell goods of one kind or quality, and represent them to be of another, the Merchant will be liable for the consequences of such fraudulent act, although there has been no fraud on his part. A payment made to a factor will bind the principal, unless the latter has given the debtor an express notice not to pay the factor.

3. *When an Agent has deviated from his orders, or has acted without instructions, and you do not intend to sanction such acts, give immediate notice of your dissent.* Silence in such cases is considered in law as equivalent to a ratification. Thus a consignee, without orders to insure, insured a ship not then heard from, and advised his principal of the fact by letter, to which the latter made no reply. Subsequently the ship arrived in port safely, and the principal refused to allow the Agent for the advance of premium: it was held that his silence had ratified the act.

When an Agent has deviated from his instructions in purchasing goods, and it is not your inten-

tion to adopt the transaction, you should give notice of rejection *within a reasonable time* after intelligence of the purchase. It is a principle established by writers on Commercial Law, that if a factor, in the execution of an order to purchase goods, deviate from instructions, in price, quality, or kind; or if, after goods are bought, he send them to a place different from that designated, they must remain to his account, unless the merchant, upon advice, admit them according to his first intention; and *if the principal have advanced money on the goods, or they are in a condition in which it would be against the interest of the factor to have them returned*, he may dispose of them as *Agent for the factor*. In the exercise of this power, however, he will not be allowed to seek a market first, but he must dispose of the goods at once, and give notice of the transaction.

4. Remember that a ratification with a full knowledge of the facts cannot subsequently be revoked; and that the adoption of an Agency in one part operates as an adoption of the whole.

5. *In conferring authority upon an Agent for a special definite purpose, where no discretionary power is intended to be given, use plain, clear, and explicit language.*

In all cases of ambiguity of language *plainly intended to be such*, in order to afford a principal the opportunity of disavowing the Agent's acts if they are disastrous, or of sanctioning them if beneficial, the law will probably justify an Agent, and those dealing with the Agent, in adopting any construction which the words of the authority may.

possibly admit of. But such instances are perhaps as rare in practice as unintentional ambiguity of language is common. Vagueness or obscurity of expression in commands, is not only extremely embarrassing to an Agent desirous to obey orders, but is unjust to persons dealing with him upon the faith of the authority; for if it be misinterpreted they are subjected to the hazard of having the contract made with the Agent disavowed by the principal.

6. In employing a Broker or Auctioneer, to sell property on which there are incumbrances, it is advisable to have *an understanding, whether he shall charge a commission on the gross or net amount of the sale.* In the absence of an agreement, he will be legally justified in charging his commission on the gross amount, including the incumbrances.

7. *When you intend to revoke the authority of an Agent clothed with general power, and whose acts have heretofore bound you, let the revocation be as generally known as was the fact of the Agency.* Advertising is the usual means of notifying a revocation of Agency, but, ordinarily, usage will determine whether a principal has done or failed to do all that it was incumbent upon him to do, to make the revocation notorious. As a general rule, an Agent cannot appoint a substitute, whose acts will bind his principal. But this "power of substitution" may be expressly given, as is usual in the common printed forms of letters-of-attorney; or it may be inferred, as where a principal appoints an agent to do something which obviously, and from its very nature, cannot be done otherwise by the Agent than through

a substitute; or where there is a known and established usage of substitution. In these cases, the substitute becomes the responsible Agent of the original principal, and may bind him by his acts, and look to him for compensation.

Passing from the duties of Principals to those of Agents, we come first to the leading rule which pervades the law of Agency—*Obedience to orders*. Hence,

1. *Where the authority is not discretionary, obey orders strictly, whatever may be the consequences to your principal.* If goods be consigned to sell *on arrival*, the consignee must sell on the first opportunity, and no circumstances, knowledge, or desire to benefit his principal will justify him in holding for a change in the market. By saying, however, that he must sell at the first opportunity, the law does not mean that he must close with the first offer, be it what it may, but it means that he must make the sale without delay, at the best price and on the best terms he can then do, without attempting to wait any change of times. Necessity, however, will sometimes justify an agent in assuming extraordinary powers, as where a commission merchant, limited to sell at a stipulated price, discovers that the goods are in a perishing condition, he may dispose of them at once, to prevent a greater or total loss. Where a commission merchant *has made advances, or incurred liabilities upon a consignment*, he may, in the absence of any agreement to the contrary, and after due notice to the consignor to provide other means, sell so much of the consign-

ment without regard to his orders as may be necessary to reimburse and discharge such advances and liabilities.*

2. *In the absence of specific instructions, pursue the accustomed mode of executing the business for which you are employed; or, in other words, follow the usages of trade.* The law imposes upon an Agent who is paid for his services, the duty of taking every pre-

* Story J., in the case of *Brown & Co. v. McGran*, 14 Pet. 479, stated the law, upon the point, to be as follows: "We understand the true doctrine on this subject to be this. Wherever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred, on account thereof; and the factor is bound to obey his orders. This, however, arises from the ordinary relation of Principal and Agent. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property therein; then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances, or meet such liabilities; unless there is some existing agreement between himself and the consignor, which controls or varies the right. Thus, for example, if, contemporaneous with the consignment and advances or liabilities, there are orders given by the consignor which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case the consignment is presumed to be received subject to such orders, and he is not at liberty to sell the goods to reimburse his advances or liabilities, until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price; unless indeed the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factors. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances or incurred liabilities thereon, if the consignor stands ready and offers to reimburse, and discharge such advances and liabilities."

caution ordinarily used, for the safety and improvement of property in his charge, without express directions from the principal; and by the fact of undertaking a service, he impliedly warrants that he possesses such competent knowledge and skill, as would in ordinary cases be adequate to the accomplishment of the object proposed. If goods be consigned to sell, and no price be limited by the instructions, it should be the Agent's endeavor to obtain the best price that the thing sold is fairly worth; and to this end he must use that degree of vigilance and intelligence which might be expected from a prudent person in the management of his own business. In regard to the safety of consigned goods, the rule is that the consignee must exercise as much care as a man of average prudence would bestow in keeping his own goods; and in the event of loss, the question asked, will be, Have you done that which, under the circumstances, was prudent and warranted by the usage of the trade? A factor is not liable in cases of robbery, fire, or any other accidental damage happening without his default; but if he have been guilty of gross negligence or improper delay, either in removing the goods, or otherwise, he will not be excused by nature of the accident.

An Agent who deviates from instructions, in remitting money, is obliged to take the risk of remittance. If no directions be given, he must remit through a banker in good credit, or if there be any other established usage of trade, it his duty to follow that.

3. When the language of your principal is obscure,

ambiguous, or contradictory, *construe it strictly, that is, do not infer that it contains more than it clearly implies.* Strict construction in such cases will not tempt you to exceed your power, and if you err, you will err on the safe side. But this is not to be understood as prohibiting the use of all necessary and usual means for executing an authority with effect, without express directions. An Agent employed to get a bill discounted, may, unless expressly restricted, indorse the bill in the name of his principal, if an indorsement is necessary to convey his employer's title. A servant authorized to sell a horse, may warrant him, unless forbidden; and it is not necessary for the party insisting on the warranty, to show that the servant had any special authority for that purpose.

4. *Always disclose your character as Agent.* If this be not done, a person with whom you deal has the right to hold you as a contracting party, and has also the right, on discovering your principal, to resort directly to him. The Agent and principal, in such cases, are both responsible.

5. *In signing obligations as Agent, avoid the use of language that may import a personal obligation on your part.* The mere adoption of the word "Agent," in executing written contracts, will not relieve from personal responsibility unless the principal's name appear on the face of the paper. A person who, though he described himself as Agent and Consignee of a vessel, entered into an agreement in his own name, "witnessing that the said parties thereto agreed," was considered personally liable on this agreement. And a Broker, who had procured a

purchaser for goods, and drew a bill for the amount payable to the principal, which was accepted but dishonored, was held answerable as drawer of the bill on the acceptor's default. An Agent purchasing foreign bills for his principal, and indorsing them to him without qualification, is liable to the principal on his indorsement, however small the commission may be which he gets upon the purchase.

An Agent should always, in his signature, express both the principal's name and his own. The most advisable form of executing deeds or contracts is "A. B." (the principal,) "by his attorney, C. D." This is certainly, and in all cases, good. Other forms, as "C. D. for A. B.," are good in some cases, whilst in others they may not relieve from personal liability. An Agent should be careful to make all covenants under seal in the name of his principal.

6. *Never employ the funds of your principal or his credit in your own behalf; for if the adventure be a losing one, you may be compelled to bear the loss, and if a successful one, to lose the profit.* A principal has the option to disavow such transactions, or to claim the benefit of them. The law further declares, that if an Agent attempt to buy the goods he has on sale for his principal, without the express consent of the latter, after full knowledge, the principal may, at his election, either hold him to the bargain as purchaser, or refuse to recognize the sale and claim any greater price or value the goods might have brought at the same time.

7. *Do not embark the property of your principal in any manner not authorized by the terms of the employment, however hopeful the prospects of profit may be.*

Thus, if a factor lends his principal's money without instructions, though for his benefit, he has no claim to have it allowed in his account, unless the principal, by the receipt of interest or other mark of approbation, assent to such disposition of his money.

8. *Keep a clear account of your transactions as Agent, and avoid mixing your principal's property and your own; for if they cannot be distinguished, the whole may become the property of the principal, as a penalty for carelessness.* "Where an Agent," says Paley in his work on Agency, "had for many years neglected to keep accounts, and had withheld part of his principal's money, an injunction was granted to restrain the transfer of the whole of certain stock, discovered to have been invested in his own name, till he should distinguish, on oath, how much of it was bought with the money of his principal. And the principle will be found established by many authorities as a settled rule of equity, that if an Agent, whose duty it is to keep the property of his employer separate, mix it with his own, it lies upon him to distinguish them; and if he cannot distinguish what is his own, the whole is to be considered as belonging to the other."* If an Agent, employed to *collect a debt*, take a note from the debtor, payable to himself, he will be liable to the principal as if he had received the

* The rule is applied in all cases where one willfully mixes his goods with those of another. If one mix his grain or his flour with that of another without his consent, "so that the proportion belonging to each cannot be distinguished, the Common Law gives the entire property to him whose original dominion was invaded and thus rendered uncertain."

money; and when an Agent, empowered to sell, who according to the usages of trade may take a note in his own name for the price, adds to the price a debt due to himself individually, he thereby makes the whole debt his own.

9. *Always keep your principal constantly advised as to the state of his business entrusted to your care.* A factor who has made a contract of sale should give his principal immediate notice of the fact; and it is alleged that if the factor fail to give such notice and the buyer becomes insolvent, the factor is responsible. The duty of keeping up correspondence is considered in law a part of the reasonable diligence due the principal, and by neglecting it the Agent is responsible for the consequences; but aside from the legal risk, it is a duty which an Agent owes to himself as a man of business. A neglect of business correspondence may be interpreted either as *prima facie* evidence of incapacity, or as an intentional insult.

When a Factor or Broker draws on his principal, a letter of advice should accompany or precede the draft; and when bills of exchange or notes are placed in his hands for the purpose of getting them accepted or negotiated, it is his duty to give all such notices as are necessary to save the rights of his principal. It is also the duty of an Agent to furnish his employer, from time to time, with a clear and plain statement of his receipts and payments upon the Agency account, and of all increase or profit made on the property or money of his principal in his hands. In this account he will be allowed to charge his principal with all payments

and advances and expenses incurred by him in the regular course of his employment. The rule on the subject of *advances*, has been stated to be this: Wherever it is necessary for an Agent, in the regular course of his employment, to make advances, the principal who deputed him in the business where they are necessary, must be taken to have requested him to make them, and is therefore bound to reimburse them. The most ordinary charges of this kind that a Commission Merchant is entitled to make, are those for premiums, warehousing, duties, general average, salvage, portage, and journeys. He is also allowed to charge all payments made for the necessary preservation of property committed to his care; and in short, for whatever expenses he incurs in order to accomplish the objects of his commission, including all damages sustained by him in the execution of his mandate, unless they have been incurred by his own default. A Commission Merchant, however, cannot legally place any thing to account under the head of "general expenses;" nor will he be entitled to charge for any payment or advances made voluntarily, and in his own wrong, as for instance, for money paid to another without an order to pay, or for money paid after revocation of the order to pay, unless the order to pay was irrevocable. These rules, it will be observed, apply only to those cases where no express agreement with the principal has been made touching them. By agreement they may be limited or enlarged.

With regard to the charge of *interest* on advances, it is allowable where it is given by the express terms of a contract, or by an engagement implied from

the nature of the security, as in the case of bills of exchange, or by the usage of the trade to which the contract has relation. If a factor or broker can support his claims, on any of these grounds, he will be entitled to be repaid his advances with interest. An Agent is *liable for interest*, if any have been actually made upon a balance in his hands; or if he mix it with his own and make use of it, unless the nature of the employment implies the consent of the principal to the enjoyment of this benefit by the Agent. No interest is due on money which has lain dead in his hands.

An Agent will not be entitled either to a commission, or to be repaid his advances, in respect of illegal transactions; nor where he has been guilty of such gross negligence or unskillfulness in conducting the business, as to render what he has done altogether useless to his principal, or actually hurtful to him; nor for business done after notice that his authority has been revoked. A factor or broker will likewise cease to be entitled to his commission, in the event of his becoming the executor or administrator of his principal.

10. *In opening a bargain, a Broker should always communicate sufficient to the parties, to identify the transaction, for he will then be entitled to his commission, even if the bargain is completed by another.*

"The rule," said Lord Abinger, in the case of *Burnett v. Bouch*, 9 C. & P., 620, "as stated by the plaintiff's witnesses is this: Where a broker has introduced the captain and merchant together, and they by his means enter into negotiation as to the voyage, he is entitled to a commission, if a charter-

party be effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write it themselves. The usage goes further: that if a broker authorized by both parties, and acting as Agent of each, communicates to the merchant what the shipowner charges, and also communicates to the shipowner what the merchant will give, and he names the ship and the parties, so as to identify the transaction, and a charter-party be ultimately effected for that voyage, the broker is entitled to his commission; but if he does not mention the names so as to identify the transaction, he does not get his commission, to the exclusion of another broker who afterwards introduces the parties to each other."

11. Commission Merchants should always obey orders *to insure*; and without express orders, they are bound to insure, when the usage of their trade, or the habit of dealing between themselves and principals, may fairly imply an obligation to insure. And further, in effecting an insurance, it is their legal duty to see that the policy covers all ordinary risks and chances—that the underwriters are in good credit—and lastly, to avoid the affirmation of any false statements, or the concealment of any material fact, by which the policy may be avoided. The penalty for neglect in making insurance, where the Agent is bound to do so, is that he himself is liable as insurer in case of loss; and if he makes insurance, but through gross mismanagement the benefit of it is lost, he is answerable for the injury sustained.

An Agent bound or instructed to make an insurance, but unable to effect it, should immediately

give his principal notice of the fact, for otherwise the latter may be subjected to a loss which he could have provided against, by procuring insurance to be made elsewhere.

12. A Commission Merchant has a *lien* on the goods of his principal in his possession, not only for the charges arising on account of them, but also a general lien for the balance of his general account, arising in the course of dealing between him and his principal, and this lien extends to all the goods of his principal in his hands in the character of factor. It must be remembered, however, that this lien only extends to claims arising from his dealings as factor, and he cannot buy up the notes of his principal and secure them under the lien. It must also be remembered that possession is necessary to the creation and continuance of a lien; and when the party has voluntarily parted with the property on which the lien has attached, he is divested of his lien. A factor, however, may part with the actual possession, and reserve the right of lien by special notice or agreement. He also has a lien on the *price* of goods he has sold, as factor, though he has parted with possession, and he may enforce payment from the buyer to himself in opposition to his principal.

13. *Where the authority is revocable, do not act as Agent after notice of its revocation.* If an authority be given for a valuable consideration, or be coupled with an interest, or be part of a security, unless there be an express stipulation that it shall be revocable, it is irrevocable *by the principal*. But in all other cases, inasmuch as it was created by his will,

the principal has the right to revoke the authority given to his Agent at his pleasure. It is presumed that even the authority of an Agent appointed for a fixed and definite period may be revoked by the principal before the expiration of that period; but in this case, except for satisfactory cause shown, as dishonesty, gambling, drunkenness, or willful disobedience to orders, the latter thereby subjects himself to a claim of damages. So, an Agent may renounce his agency, but in so doing he renders himself liable for all losses and damages accruing to his principal from his renunciation, unless the Agency be purely voluntary and gratuitous.

An Agency may be revoked by the operation of law; and this may arise either by the lapse of time for which it was limited, as if it be created for a year and the year elapse; or by a change of condition or of state in either party producing an incapacity to act, as if an unmarried woman execute a power-of-attorney and then marry or become insane; or by the principal becoming bankrupt; or by the death of either party; or by the extinction of the subject-matter of the Agency; or by the complete execution of the trust. There is but *one exception* to the rule, that insanity or death of the principal revokes a power-of-attorney, and that is where the power or authority is coupled *with an interest in the thing actually vested in the Agent*. Therefore, a power-of-attorney to sell ships, or stock, or goods in the name of the principal, necessarily ceases with his life; and hence this kind of security so frequently taken for advances or loans of money, possesses an inherent defect, and upon the death

of the party granting it, may become utterly valueless. The creditor in such cases, in the event of the party dying insolvent, must share with the other creditors, notwithstanding his presumed special lien or security.*

The revocation of an Agency, *when made by the act of the principal*, takes effect as to the Agent from the time when known to him, and as to third persons when known to them, and not before. Hence if a clerk or Agent employed to sign, indorse, or accept bills for the principal, be discharged by the principal, and the discharge is not known to persons dealing with him, bills subsequently signed, indorsed, or accepted by him, may bind the principal.

To third persons dealing with Agents the law offers a few cautions.

1. *In dealing with an Agent, always demand satisfactory evidence of his authority to act for his principal.* This caution is especially necessary in dealing with an Agent appointed for a particular purpose; for if there be any qualification or condition annexed to his authority, it must be observed. A. authorized B. to sign his name to a note for \$250, payable in six months, and he signed one payable in sixty days, it was held that A. was not liable because the special authority was not strictly pursued. An Agent who exceeds his authority binds himself, but not his principal.

When about to buy goods from a *carrier or wharfinger*, the buyer should always take pains to satisfy

* See the important case of *Hunt v. Rousmainere's Administrators*, 8 Wheat. R. 174-204.

himself that the former has authority to sell. A carrier or wharfinger having possession for a specific purpose only, the property is not changed by such sale if it be wrongful, and the owner may recover the goods even from a *bona fide* holder after payment.

In buying or taking a bill of exchange, or note drawn or accepted "per procuration," require the production of authority to draw or accept. A failure to do this involved Messrs. Atwood & Co., bankers, of London, in a considerable loss.

2. *Traders, dealing with Brokers as if they were merchants, should always inquire into their real authority to bind their principals.* "It would be well," says Lord Ellenborough, "if traders, when they deal with Brokers as if they were merchants, would make themselves secure by first inquiring whether they will be borne out in dealing with them in that character; it would save a vast deal of risk and litigation."

3. *Never make advances on a bill of lading without an inspection of the letter of advice which accompanied it.* It is a well-established principle in law, that a factor cannot pledge the goods of his principal *for his own debt*; and the best evidence that one can have, whether he is dealing with a factor or a vendee, is the letter of advice which accompanies the bill of lading. The law on this subject has been laid down by Judge Story to be as follows: "Factors have no incidental authority to barter the goods of their principal, or to pledge such goods for advances made to them on their own account or for debts due by themselves; although they may certainly pledge them

for advances lawfully made on account of their principal, or for advances made to themselves to the extent of their own lien on the goods. So, factors may pledge the goods of their principal for the payment of the duties and other charges due thereon, and indeed for any other charges and purposes which are allowed for the usages of trade." *

4. *If money be due on a written security, do not pay either principal or interest to an Agent unless he has possession of the securities, or some special authority to collect it, for though the money may have been advanced through the medium of an Agent, yet if the securities do not remain in his possession a payment will not discharge the debtor.*

Payment may be safely made to a factor in the course of his business, and without notice from the principal not to pay; but payment cannot in general be safely made to a Broker when the principal is known.

Intimately connected with the subject of Agency is that of BAILMENT, or the delivery of goods by one person to another for an express purpose, to be restored when the trust is executed. Its leading principles are mainly these: If you deposit goods with another to be kept by him and returned *without reward*; or if you employ another to do some act respecting the goods *without recompense*, the goods are at your risk, and he is only responsible for *gross*

* In Pennsylvania, a statute recently passed allows consignees or factors to make a *bona fide* pledge of goods consigned to them, in all cases where the pledgee has not actual notice that they are not the owners of such goods.

neglect or a breach of good faith. If, however, you *lend* a man an article for a certain time to be used *without paying for the use*, the rule is different, and he is liable for all damages, excepting the deterioration arising from a reasonable use of the loan, and for all loss, except by inevitable accident, which could not have been foreseen or guarded against. If, however, he *has* detained the loan beyond the time specified, he is liable for a loss, even by inevitable accident. If you *lend* another an article *for hire*, he is answerable only for *ordinary neglect*, and in case of loss it is incumbent on you to prove the want of due care. If, however, he has applied it to some other use, or has detained it for a longer period than that for which it was hired, or if damaged, refuses to explain how the damage was occasioned, the burden of proof that there was no negligence on his part, is upon the hirer. If you employ a special person to carry goods from one place to another, though you pay him for the service, he is only answerable for ordinary neglect. But if he hold himself out to carry all goods, or all goods of a particular class, he becomes a *common carrier*, and it is a general rule of law that common carriers are liable for all losses which are not occasioned by inevitable accident or the public enemies of the country. This general responsibility may be limited by special agreement with their customers; but neither notice nor agreement will exempt them from *liability for damages occasioned by actual negligence*.

Finally, in depositing negotiable paper with private bankers or banks *for collection*, it is prudent to

indorse it specially, as "Pay to my credit,"—for an indorsement *in blank* upon notes or bills of exchange, in the possession of a banker, is *prima facie* evidence that they have been discounted, and in the event of his failure they may pass to the assignees as part of the estate. If, however, they have been entered "short," in the bank passbook, as our custom is this presumption of law will be rebutted.

We have thus stated the points that occur to us as important to be observed in the various circumstances arising out of the relation of Principal and Agent. In how many instances they may be neglected with impunity it is not within our province to determine. Our predecessors seem to have experimented upon this point, as the law-books will show, at a heavy cost to themselves, but with a manifest advantage to us if we choose to avail ourselves of their experience. But neither the past nor the present generation, legislative wisdom nor legal acumen, have yet been able to guard against those numberless cases where "fraud weaves its web in secret, or hides its head by flight to distant lands." To diminish risks such as these, we must aid in enlightening the conscience and purifying the heart by the dissemination of principles more stable than those of the Common Law—principles of honor, good faith, and religious obligation. Hence it is that merchants, as merchants, have a direct and personal interest in whatever may aid in diminishing darkness, diffusing intelligence, and extending the sway of virtue.

CHAPTER III.

PARTNERSHIP.

HOW TO FORM, CONDUCT, AND DISSOLVE PARTNERSHIPS LEGALLY.

A PERSON whose fidelity as agent has attracted the confidence of those who have witnessed his conduct, ordinarily enters upon the second stage of his mercantile career, by becoming associated with some one needing his labor or skill, or by uniting his capital with that of others, for their common profit. This association or union is usually a Partnership; which, though it partakes largely of the nature and character of agency, inasmuch as each of the partners is a general agent for the others, within the scope of the Partnership business, it is nevertheless governed by rules and principles peculiar to itself. With the assumption of new rights and new powers, the law imposes upon a partner new and peculiar obligations.

Partnership has been defined to be *a voluntary contract of two or more persons, to place their money, property, skill or labor, or some or all of them, in lawful business, and to divide the profit and bear the loss in certain proportions.* To constitute a Partnership, therefore, the contract must be founded in good faith and positive consent of the parties; the purpose must be lawful; and there must be a common in-

terest in the profits. These are its ingredients. Hence, if the contract be founded in fraud or imposition, either upon one of the parties or upon third persons; or if it be framed for illegal or immoral purposes, as for illegal gaming, or illegal insurances or wagers, or to support a house of ill-fame, it is utterly void. And if the contract be for the sole and exclusive benefit of one party; for instance, if it be agreed that one of the parties shall have all the profits, this would be a nullity, and constitute no Partnership as between themselves. But in order to constitute a Partnership it is not essential that the parties shall share the profits and losses in equal proportions. It is even competent for them to stipulate that the profits shall be divided, but if there be no profits, the loss shall be borne by one or more of the partners exclusively, and the other shall be exempted therefrom.

There is a marked distinction between Partnership as respects the public, and Partnership as respects the parties; and a person may be liable as a partner to third persons, although the agreement does not create a Partnership between the parties themselves. A common instance of this distinction is found in the well-known fact, that a person who *lends his name as partner*, though he contribute neither money nor time, nor receives any share of the profit, or a person who suffers his name to continue in the firm after he has ceased to be an actual partner, is responsible to third persons as a partner. The general rule of interpretation adopted in this class of cases is, that where it is *plainly contrary* to the intentions and objects of the parties to create a Partner-

ship, and their whole transactions are clearly susceptible of a different interpretation or exclude some of the essential ingredients of a Partnership, none will be created between themselves, or as respects third persons. But in the absence of such clear interpretation or controlling circumstances, the presumption of law is, that they are partners as respects third persons. Thus, a person may stipulate for a share of the profits without rendering himself liable as partner, if he can clearly show that it is done in the character of an agent, as a mere compensation for labor and services; but where the agreement either expressly or by fair implication admits that the parties are to share in the losses as well as in profits, that circumstance will ordinarily, at the common law, be held to make them partners as to third persons, upon the ground that it is inconsistent with the assumption that the share of the profits is designed to be a mere remuneration for services. Hence secret or dormant partners, when discovered, are equally liable as if their names had appeared in the firm; and even if the parties had agreed that there should be no Partnership between them, but they were merely to share the profits and losses, or the profits only, and one was to bear the losses, they would nevertheless be deemed partners, and each would be responsible for all the debts and contracts growing out of the trade or business. The decisions on these points, however, are full of subtle distinctions, and persons who desire to divide profits without assuming the relation of partners, should never conclude an agreement except by and with the advice of an able legal adviser. In fact, the

objection; that fine and subtle distinctions abound, is unfortunately true of the whole law of Partnership; but we shall endeavor to state those points only that are well settled, and such as will satisfy the doubts and inquiries of the greatest number about to assume this important relation.

L. HOW TO FORM A PARTNERSHIP.

Partnerships are divided into two kinds, *general* and *special* or limited Partnerships. A general partner is liable *in solido*, for the whole amount of the Partnership debts, without reference to the proportion of his interest, or the nature of the stipulation between him and his associates; but a special partner in a limited Partnership, established in conformity with the statute law of the States in which it is allowed, is answerable only to the extent of the funds he invests in the Partnership.

1. The first caution to be observed in the formation of a *general Partnership* is *care in the selection of a partner*.

By entering into Partnership, each party reposes confidence in the other, and constitutes him his general agent as to all the Partnership concerns: hence, the act of one, whenever it has the appearance of being on behalf of the firm, is considered as the act of the rest.

One partner can buy and sell Partnership effects, make contracts in reference to the business of the firm, pay and receive money, draw and indorse, and accept bills and notes, and the act of one partner, though on his private account, and contrary to a private arrangement among themselves, will bind

all the partners if made without knowledge in the other party of the arrangement, and in a matter which, according to the usual course of dealing, has reference to the business transacted by the firm.

The representation of any fact or a misrepresentation of a fact made in any Partnership transaction by one partner, or the commission of any fraud, even when the other partners have not the slightest connection with, or knowledge of the fraud, will bind the firm.

In all contracts concerning negotiable paper, the act of one partner binds all; even though he signs his individual name, provided it appears on the face of the paper to be on Partnership account, and to be intended to have a joint operation. But if a bill or note be drawn by one partner, in his name only, and without appearing to be on Partnership account, the Partnership is not bound by the signature, even though it was made for a Partnership purpose.* And if Partnership security be taken from one partner, without the previous knowledge or consent of the others, for a debt which the creditor knew at the time was the private debt of the particular partner, it would be a fraudulent transaction, and clearly void in respect to the Partnership. So

* If, however, the bill be drawn by one partner, in his own name upon the firm, on Partnership account, the act of drawing has been held to amount, in judgment of law, to an acceptance of the bill by the drawer, in behalf of the firm, and to bind the firm as an accepted bill. (5 *Day's Rep.* 511.) Even if the paper was made in a case which was not in its nature a Partnership transaction, yet it will bind the firm if it was done in the name of the firm, and there be evidence that it was done under its express or implied sanction.

if from the subject-matter of the contract, or the course of dealing of the Partnership, the creditor was chargeable with constructive knowledge of that fact, the Partnership is not liable.

If, however, the negotiable paper of a firm be given by one partner on his private account, and that paper issued within the general scope of the authority of the firm, passes into the hands of a *bona fide* holder, who has no notice, either actually or constructively, of the consideration of the instrument; or if one partner should purchase on his private account, an article in which the firm dealt, or which had an immediate connection with the business of the firm, a different rule applies, and one which requires the knowledge of its being a private and not a Partnership transaction to be brought home to the claimant.

One partner may *pledge* as well as sell the Partnership effects in a case free from collusion, if done in the usual mode of dealing, and it has relation to the trade in which the partners are engaged, and when the pawnee had no knowledge that the property was Partnership property. And if one partner acts fraudulently with strangers in a transaction within the scope of the Partnership authority, the firm is nevertheless bound by the contract.

It is a general principle of law that one partner cannot bind a firm by deed, but nevertheless he may by deed execute the ordinary release of a debt belonging to the copartnership, and thereby bar the firm of a right which it possessed jointly.

2. *Exercise due caution in the formation of a Partnership with a man in embarrassed circumstances.*

How far and in what manner, the separate creditors of one of the partners may interfere with the affairs of the firm, to obtain satisfaction for his debt, is a question by no means well understood by the public, and on which the authorities have been fluctuating. It was formerly held that the sheriff, under an execution against one of two copartners, might take the Partnership effects, and sell the moiety of the debtor, treating the property as if owned by tenants in common. But the principle is now well settled, both at law and in equity, that a separate creditor can take and sell only the *interest* of the debtor in the Partnership property, being his share upon a division of the surplus, after discharging all demands upon the copartnership. "The Partnership property," says Justice Story, "may be taken in execution upon a separate judgment and execution against one partner; but the sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. By such seizure the sheriff acquires a special property in the goods seized; and the judgment creditor himself may, and the sheriff also, with the consent of the judgment creditor, may file a bill against the other partners for the ascertainment of the quantity of that interest, before any sale is actually made under the execution. The judgment creditor, however, is not bound, if he does not choose to wait until such interest is so ascertained, but he may require the sheriff immediately to proceed to a sale, which order the sheriff is bound by law to obey. In the event of a

sale, the purchaser at the sale is substituted to the rights of the execution partner, *quoad* the property sold, and becomes a tenant in common thereof; and he may file a bill, or a bill may be filed against him by the other partners, to ascertain the quantity of interest which he has acquired by the sale." The purchaser thus acquires all the rights the insolvent partner had in the property, but he is not bound to become a partner, nor are the others bound to admit him; therefore the effect of such sale, is to dissolve the Partnership.

Hence Justice Story further remarks: "It is a strange anomaly in jurisprudence, that third persons should be entitled to dissolve the solemn *bona fide* contracts of partners, at their own caprice and pleasure, however ruinous may be the effects to innocent partners; for the Partnership may thus be dissolved in the midst of the most successful adventure, and thus irreparable losses may ensue therefrom. However, this is not a peculiar feature of the common law; for it is found equally recognized in the Roman law, at least where all the effects of the partner are sold to his creditors."

3. *It is always advisable and prudent to have the terms of the agreement embodied in written and carefully prepared articles of copartnership.*

This consideration though not absolutely essential is important. It is true, that entries in the books of a Partnership may be as conclusive of the rights of the partners as if prescribed in a regular contract. It is also true, that by a course of dealing so long as to demonstrate that all the partners have agreed to change the terms of an original written agreement,

it will be held to have been waived or superceded. But it is nevertheless a dictate of prudence and sound policy to provide at the outset of a union against the occurrence of difficulties, and to prescribe the course to be pursued in case they arise, lest a Court of Equity intervene and take the administration of the property out of the hands of all. The importance of this was evidenced by the case of *Holdin's administrators vs. McMakin*, where the judge remarked: "The court must presume that the defendant knew the law when the Partnership was formed, and if he wished to guard against the legal effects of the dissolution of a Partnership at will, by the death of his copartner, it was his duty to have provided against the consequences which flow from such a state of things, by articles of Partnership, while the other partner was in full life. He having failed to do so, we must apply the principles of the law to each case as we find it."

4. *Stipulate in the articles of copartnership, as to the time of its commencement and duration.* Where no time has been fixed for the *commencement* of a Partnership, the law presumes it took place from the date and execution of the instrument. Where no definite period is fixed for its *duration*, a partner may withdraw at a moment's notice, and at his will and pleasure dissolve the Partnership. But even if a definite period be agreed upon, it is now considered that a partner may, by giving notice, dissolve the Partnership as to all future capacity of the firm to bind him by contract; but in this case, he subjects himself to a claim of damages for a breach of the covenant. It is also held that the death of either

party within the period named dissolves the Partnership; but parties may provide against this, by stipulating that in case of death the representatives of the deceased partner may carry on the business in connection with the survivors for the benefit of his widow and children. Stipulations of this kind are common in Partnerships established for a long term of years, where the original outlay in permanent fixtures is great, and numerous questions have arisen as to their precise meaning and effect. One was whether it is a matter of election with the widow, children, appointee or executor or administrator of the deceased, to continue the Partnership or not; or whether it is absolute and peremptory upon them. It was held, in the absence of any positive direction, that it is *optional* with the party so appointed to continue the Partnership or not, as they may think proper, but they will be considered as partners unless they give notice within a reasonable time to the contrary. Another question was, where a provision for the continuance of a Partnership after the death of one of the partners had been inserted, as to the extent to which contracts made after the death of that partner binds his assets. It was held, in the absence of clear and unambiguous language to the contrary, that the general assets of the deceased are not liable for the debts of the Partnership, contracted after his death; but the responsibility is limited to the extent of the funds already embarked in the trade, or any specific amount to be invested therein, for that purpose. An executor or administrator, or the person carrying on the trade, will how-

ever be personally responsible as partner for all debts contracted.

5. In case it has been agreed that one or more of the partners shall have exclusive management of the business, or any particular branch thereof, insert this provision in the articles of copartnership, and a court of equity will uphold it, and give it full effect.

6. Where the Partnership is composed of numerous persons, insert a stipulation in the articles *that the majority shall have the right to direct and regulate the concerns* of the Partnership, and in cases of difficulty that they shall have the power *to wind up or sell the concern*. Without an express stipulation of this kind, it is doubtful whether the majority have power to bind a minority who dissent, and it is certain that the power of a majority to wind up or sell a concern will not be presumed, but must be expressly given.

7. *Insert in the copartnership agreement a stipulation prohibiting the copartners from becoming bound as surety or otherwise, except with the consent of all*, under penalty of giving the others the right to dissolve the Partnership. A stipulation of this kind is exceedingly useful; not that such contracts of suretyship, it has been remarked, bind the firm, for ordinarily they do not, and being private stipulations between the parties, they do not affect the public; but this prohibition acts as a salutary restraint upon the copartners, especially the younger members of houses, saving them from the indulgence of a heedless kindness, and relieving them from solicitations for favors which it is often difficult to resist, and generally wrong to grant.

8. *Specify in the articles of copartnership, what disposition is to be made of the joint property in the event of a dissolution.* This is, perhaps, the most important of all the stipulations. It is manifestly one of the first dictates of prudence to provide, at the commencement of the union, when there is mutual confidence and good feeling between the parties, and when the uncertainty as to which party shall fall under the adverse operation of any stipulations insures the adoption of such as are mutually and reciprocally just, for the disposition of the property in the event of dissolution; where this provision is neglected, and the copartnership terminates by the expiration of the term agreed upon, the property may be placed in such a position of embarrassment that nothing but the interposition of a Court of Equity can save it from destruction.*

* An eminent lawyer, has graphically described the usual consequences resulting from a dissolution by the dissension of the partners.

"The dissolution generally finds the debts unpaid; the property with its ownership balanced among dissenting parties, so as to be rendered incapable of application to its purposes; the debts liable to be seized by each partner, as he can persuade the debtors to pay him; the creditors left to suits exhausting the funds with expenses; while the copartners are striving for their own interest, or the gratification of angry passions. If none of the copartners resort to a Court of Equity, the creditors recover their judgments at law for debts, and pursue the copartners individually, exhausting first the man of most property, or whose effects are most accessible; it therefore becomes at once his interest to have the property put into a train of proper administration, and he applies, in a suit in chancery, for a settlement of the Partnership accounts, for the appointment of a receiver to whom the Partnership property and debts shall be delivered, and for an

9. *In forming a limited Partnership, a special partner should exercise great care in complying literally*

injunction against the partners respectively, from receiving or interfering with any of the effects until distributed by order of the court. This course secures the property from the wanton waste of the copartners, but subjects it to heavy expenses and to those losses which invariably attend the closing of estates by others than those immediately interested in them as owners. This course also involves some delay, and it is therefore in many cases resorted to or threatened as a menace by those who would be ashamed, and restrained by public opinion, from producing the same injuries in a more direct manner. But it is to be remembered by all such, that the Court of Equity, while it acts according to principles well settled, yet acts in modes ever varying according to circumstances. If a case of oppression or great injury to the property occurs, it will, under suitable precautions of security, appoint some one of the copartners receiver; may allow advances to be made out of the collections by the receiver, in case suitable securities are offered, and the apparent safety of the creditors' interests allow it; and generally it will so adapt its remedy, as to create the least possible injury to the contending parties, acting on the reverse of the warlike principle. The man resorting to it, in preference to an amicable settlement on terms of mutual concession, may therefore sometimes find that although he has inflicted on his former associate some wounds, his blows have chiefly recoiled upon himself. The court will cause the property to be sold for the payment of the debts, unless a specific division can be agreed on, and funds supplied from other sources than a sale for the payment of the debts; cases of specific division by legal proceedings are not to be found. No right exists in any party to take the property on appraisal. The court will also cause the copartnership accounts to be settled under its own direction, and by its own officers, according to the copartnership books, and other suitable evidence. The final termination of the affair thus becomes somewhat protracted, and exceedingly troublesome and expensive; still it is a better resort than submission to threats of its inconvenience. A threat of the kind once submitted to, invites to every other possible unjust pretension,

and accurately with the Statute Law respecting limited Partnerships of the State in which it is formed. Limited Partnerships are the creatures of Statute Law, and the provisions of the statutes allowing them must be strictly complied with, or the Partnership will be a general and not a limited Partnership. The statutes of the States allowing limited Partnerships, differ in some important particulars; but the following are the general provisions. There must be one or more persons who are general partners, and one or more who furnish certain funds to the common stock, but whose liability shall extend no further than the fund furnished, and who are called special partners. The names of the special partners are not to be used in the firm, which shall contain the names of the general partners only, without the addition of the word company, or any other general term; nor are they to transact any business on account of the Partnership, or be employed for that purpose as agents, attorneys, or otherwise; but they

and of all courses is, considering its consequences, generally the most expensive.

“But it is not very often that parties are so forgetful of their interests, in the vehemency of their desires to do injury to each other, as to stand out to those disastrous measures, and most frequently an amicable dissolution is agreed to; the parties divide the property by arrangements among themselves, assume their proportions of the debts, give securities to each other for the payment of the debts assumed, and so terminate their joint connection. Of course the modes of such settlement are very various; but it seldom happens that a disposition to mutual concession, without which opposing interests never can be reconciled, and the aid and advice of judicious friends, cannot bring a dissolved Partnership to a better termination than a lawsuit will yield.”

may, nevertheless, advise as to the management of the Partnership concern. Before such a Partnership can act, a registry thereof must be made in the clerk's office of the county, with an accompanying certificate, signed by the parties, and duly acknowledged, and containing the title of the firm, the general nature of the business, the names of the partners, the amount of capital furnished by the special partners, and the period of the Partnership. The capital advanced by the special partners must be in cash, and an affidavit filed stating the fact. Publication must likewise be made, for at least six weeks, of the terms of the Partnership, and due publication, for four weeks, of the dissolution of the Partnership, by the act of the parties prior to the time specified in the certificate.

No such Partnership can make assignments or transfers, or create any lien, with the intent to give preference to creditors. The special partners may receive an annual interest on the capital invested, provided there be no deduction of the original capital; they cannot be permitted to claim as creditors in case of the insolvency of the Partnership.

II. HOW TO CONDUCT A PARTNERSHIP.

After the formation of a Partnership, the duties of partners in their relations to each other and to the public, may be summed up in two general rules of conduct, which are the cardinal principles of the contract, viz.:—*the observance of good faith in all their dealings, and the exercise of a reasonable skill and diligence in matters pertaining to the copartnership.* The law ordinarily does not justify one in

placing that confidence in another which overlooks things that might naturally excite inquiry and suspicion, but in the relation of Partnership it justifies entire confidence, and a Court of Equity will interfere to restrain a partner from violating good faith, or will compel him to bear all the losses, or account to the firm for all the profits made thereby.

The obligations implied in the observance of good faith are too numerous to particularise; but one is, *strict conformity to all the stipulations contained in the Partnership articles*. Hence a stipulation that each partner shall withdraw only so much of the funds of the firm as may be necessary for "private expenses," must be carried out in its true meaning; and, as Chancellor Kent observed in one case, "to consider plate, musical instruments, carriages, and horses, and the whole furniture of a house as coming within the permission granted to the parties to withdraw the funds of the house only when necessary for private purposes, is, in my judgment, an unreasonable and extravagant pretension." "The least that I can do in this case, is to make them pay interest on all moneys withdrawn beyond the private necessity expressed in the contract."

Another obligation implied in the injunction to observe good faith is, that a partner shall not be at liberty to deal on his private account in any matter, or conduct a business which is obviously at variance with the interest of the Partnership, and ordinarily a Court of Equity will restrain him from so doing, or compel him to account for all the profits made thereby. The law takes into consideration the temptation to which he is exposed, to exercise a

sharper sagacity in the sales and purchases for his private account than for that of the Partnership. But, in the absence of an express agreement, a Court of Equity will not interfere to restrain a partner from engaging in another business not manifestly in conflict with, or incompatible with the interests of the Partnership.

Good faith also requires each partner to keep precise accounts of all his transactions for the firm, and always have them open for the inspection of his partners, and ready for explanation.

In addition to the observance of good faith, the relation of Partnership demands from a partner the exercise of *reasonable skill, and diligence, and sound judgment and discretion in the management of the Partnership business*. It also implies that each partner shall give and exert such skill and discretion without compensation, commission, or reward: hence, where any allowance is intended to be made for extra services or labor, by either partner, it should be inserted in the Partnership articles. Whether interest can be charged by a partner on advances made to the firm before a general settlement or dissolution, is a question not conclusively settled.

Lastly—*Partners should always use the proper style of the firm in signing contracts for the Partnership*. "It will be a clear breach of duty and engagement," says Story, "to use another firm name as that of the firm; as for example, if the firm name be Doe & Roe, to use the name of Doe & Company, or Doe & Roe & Company. It will be equally a breach for one partner to sign his own name, adding 'for self and partners;' for by those words it can no more be known who are his

partners, whom he means to bind, than by any other general words."

III. HOW TO DISSOLVE A PARTNERSHIP.

Partnerships may be dissolved from various causes and in various modes; but they are usually dissolved, either by the act or agreement of the partners, or some of them, or by a decree of a Court of Equity, or by the mere operation of law.

1. Where no certain time is fixed for the duration of a Partnership, it is deemed a Partnership at will, and is dissoluble at the will of any one or more of the partners. And even where a certain period of duration has been fixed, it is now considered by the weight of authorities, though the question can scarcely be called definitively settled, that a partner by giving notice may dissolve the Partnership. In this case, however, as has been before observed, he subjects himself to a claim of damages for a breach of the covenant. Where a Partnership is carried on after the expiration of the original term prescribed for its duration, without any new agreement, it seems to be regarded in law as a Partnership dissoluble at the will of any of the partners; but in all other respects, as to rights, duties, liabilities, proportions of profit or loss, existing in accordance with the original contract.

2. Courts of Equity have extensive jurisdiction in matters of Partnership, and they have power, on proper application, to decree a dissolution whenever circumstances seem to warrant or justice demand a dissolution. This power will be exercised in all cases of gross misconduct, or abuse of authority, or

gross want of good faith or diligence, such as do and must continue to work serious and permanent injury to the prosperity of the firm ; but Courts of Equity will not interfere in cases of mere defects of temper, casual disputes, differences of opinion, and other minor grievances, however inconvenient and annoying. "When partners differ," says Lord Eldon, "as they sometimes do when they enter into another kind of partnership, they should recollect that they entered into it for better and worse, and this court has no jurisdiction to make a separation between them, because one is more sullen or less good-tempered than the other." A Partnership may also be dissolved by a Court of Equity whenever the object for which the Partnership was formed becomes impracticable; or where one of the partners becomes unable or incapable of performing his obligations and duties—as where the one, who was to contribute the capital, becomes by misfortune unable to furnish it; or where the one who was to contribute the skill and services necessary to conduct the business, becomes paralytic or hopelessly infirm or insane. But to justify the court in the exercise of this remedy—the inability, or infirmity, or insanity must amount to a permanent and confirmed, not merely temporary, disqualification to perform the duties of the Partnership.

3. A Partnership is dissolved by mere operation of law whenever one or more of the partners makes a voluntary and *bona fide* assignment of all his interest in the Partnership property; or by the bankruptcy or death of one or more of the partners; or

by a war between the countries of which the partners are subjects.

A voluntary and bona fide assignment of a partner's interest within the period fixed by the Partnership articles, has been held to work a dissolution *ipso facto*, since the purchaser cannot be compelled to become a partner, nor are the others bound to admit him. A bankruptcy or insolvency of one or more of the partners produces this effect immediately upon the declaration of bankruptcy under the commission, by relation back to the time when the act of bankruptcy was committed; so that from that period the bankrupt is deemed divested of all his property, which is thenceforth vested in his assignees. This, however, must be understood as referring to a technical bankruptcy under the insolvent law, and not a mere inability to pay just debts, which does not itself work a dissolution, but gives the other partners the right to declare a dissolution. The *death* of a partner, unless it is otherwise expressly stipulated by the partners, puts an end to the Partnership from the time of its occurrence, whether known or unknown to the other parties, and whether third persons have or have not notice thereof.

A declaration of war is construed to render the respective subjects of each country positive enemies of each other. They cannot lawfully carry on any commercial or other intercourse, nor make any valid contracts with each other. They can institute no suits in the courts of each country, and their property, in the absence of treaty regulations to the contrary, is mutually liable to capture and confiscation by the subjects of either country. "Now it is

obvious from these considerations," says Justice Story, "that the whole objects and ends of the Partnership, the application of the joint funds, skill, labor, and enterprise of all the partners in the common business thereof, can no longer be attained. The conclusion therefore would seem to be absolutely irresistible, that this mutual supervening incapacity must, upon the very principles applied to all analogous cases, amount to a positive dissolution of the partnership."

The marriage of a female partner will also operate as a dissolution of Partnership at common law; for all her personal property and effects being transferred to her husband, she cannot by her own act introduce the agency of a new partner into the firm.

4. On dissolution of a Partnership by consent of the parties, have the agreement of dissolution indorsed in writing on the articles of copartnership; and where one partner takes an assignment of a debt due the firm, it should be in writing, and immediate and express notice given the debtor.

The advantage of having agreements evidenced by writing must be obvious to every one, and the importance of giving notice to the debtor in case of the assignment of book accounts is equally manifest; for until such notice be given, the debtor will be justified in paying the other partners, who are always presumed to have the right to receive money and give acquittances; and in the event of bankruptcy, the debt will follow the disposition of the joint estate. A like rule should be adopted by those who have assumed to receive and pay all debts due, to or from

the concern. Notice in a newspaper of this fact will not be sufficient to alter the order and disposition of the debts owing to the firm, inasmuch as the law requires *express* notice to the debtors.

5. *When a Partnership has been dissolved by the withdrawal or retirement of one of the partners, due notice should be given of the dissolution in one of the usual advertising gazettes of the place where the business was carried on, and actual and express notice to all who previously had dealings with the firm.* Without this the partners may still act in the name of the firm, and create liabilities on its members in favor of others, unless it can be proved that they had notice of the dissolution. A notice, however, is not necessary in cases of dissolution by the bankruptcy or death of a partner; nor where a dormant partner retires from a firm, except to those who knew the fact of his being a dormant partner.

6. *Avoid improper delay in the settlement of the affairs of a firm which has been dissolved, or a Court of Equity may intervene, and appoint a receiver to conduct it.*

In cases of dissolution by the death of a partner, the surviving partner, or partners, have the right to settle the affairs of the firm, but what will amount to an improper delay in doing so will probably depend upon circumstances. In the case of *Holdin's administrators vs. McMakin*, where the surviving partner had not taken any steps to dispose of the property within a year, the court held "that there had been that improper delay which would justify the plaintiffs in demanding the aid of a Court of Equity."

7. A partner having the right to wind up the affairs

of a firm, has necessarily the right to collect debts due it, adjust unsettled accounts, and discharge liabilities, but he has no right to contract new debts, buy or sell goods on account of the firm in the course of the former trade, except for the purpose of settlement, under penalty of being accountable for all profits made thereby, while all losses must be borne by himself. One partner may sign the name of the firm to a receipt given to a debtor of the firm, but all must unite to render the indorsation of a note, or the acceptance of a bill valid, unless one has been especially empowered to act for them.

8. With regard to the *mode of settling Partnership affairs*, the course varies with circumstances. If the partners have specified a particular mode in their articles of copartnership, that will be held to furnish the true rule of adjustment in winding up the Partnership affairs. In the absence of express stipulations, or the abandonment thereof, the course adopted by *Courts of Equity* is, first, to order a sale of all the real and personal property, including stock, leases and goodwill, as the best means of ascertaining the value, and from the proceeds thereof to discharge the debts of the concern. After the debts have been discharged, an account will be taken between the partners, going no further back than the *last stated account*, unless a gross and palpable error or fraud can be shown. Each partner is to be credited with whatever he has advanced to the Partnership, and charged with all the debts and claims which he owes, or is accountable for to the Partnership; with all interest accruing upon the same debts and claims; and with all profits which he has

made out the Partnership effects, during the Partnership or since the dissolution, either rightfully or by a misapplication thereof. In the final division, the partners share equally, if the contract or books or usage of the firm do not show a different arrangement.

With regard to the *distribution of the assets of bankrupt or insolvent partners* among the joint creditors of the firm, and the separate creditors of one or more of the partners, the rule is, that the joint creditors have the primary claim upon the joint fund, and the separate creditors on the separate estate. "So far as the Partnership property has been acquired by means of Partnership debts," says Chancellor Kent in his Commentaries, "those debts have, in equity, a priority of claim to be discharged; and the separate creditors are only entitled in equity to seek payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that Partnership debts must be paid out of the Partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the Partnership creditors cannot obtain payment out of the Partnership estate, they cannot in equity resort to the private and separate estate, until private and separate creditors are satisfied. Nor have the creditors of the individual

partners any claim upon the Partnership property, until all the Partnership creditors are satisfied. The basis of the general rule is, that the funds are to be liable on which the credit was given. In contracts with a Partnership the credit is supposed to be given to the firm; but those who deal with an individual member rely upon his sufficiency. Partnership effects cannot be taken by attachment, or sold on execution to satisfy a creditor of one of the partners only, except it be to the extent of the interest of such separate partner in the effects, after settlement of all accounts. The sale is made subject to the Partnership debts, and is in effect only a sale of the undefined surplus interest of the partner defendant after the Partnership debts are paid. In pursuance of this principle it is held, that the creditor of an ostensible partner, and who gave him credit as a single individual, is not to be postponed in his attachment upon the stock in trade to another creditor who may subsequently attach the same stock for a debt created equally upon the same credit, though he should have discovered a concealed partner, and set up his claim as a Partnership creditor. This claim of the joint creditors is no such a lien upon the Partnership property, but that a *bona fide* alienation to a purchaser for valuable consideration, by the partners, or either of them, before judgment and execution, will be held valid. Upon a dissolution of a Partnership, each partner has a lien upon the Partnership effects as well for his indemnity as for his proportion of the surplus. But creditors have no lien upon the Partnership effects for their debts. Their equity is the equity

of the partners operating to the payment of the Partnership debts. These are the just and obvious principles of equity, on which we need not enlarge; and they have been recognized and settled by a series of English and American decisions."

It has also been settled that there can be no set-off of joint debts against separate debts, unless there be some special agreement between the parties to this effect, or some equitable circumstances creating it in the particular case; and that a solvent partner cannot prove his own separate debt against the separate estate of a bankrupt partner, so as to come in competition with the joint creditors of the Partnership; for he is himself liable to all the joint creditors. After the demands of creditors have been finally liquidated, the partners may be creditors of each other; but not before. Lastly, where the bankrupt, at the time of his bankruptcy, has in his possession, or at his disposition, with the consent of the true owner, any goods or chattels, of which he is the reputed owner, they will pass to his assignees in opposition to the claims of the real owners. But if they are withdrawn, in good faith, at any time, however short, before the bankruptcy, the property cannot be reclaimed by the assignees.

6. When one partner assigns his share or interest in the Partnership property to the others, *observe that the word release is used*. Partners are joint tenants, and it is said that the word "release" can alone pass the whole interest.

Finally, when a change has been made in a firm by the retirement of a former partner or the admission of a new one, *take new securities in all cases of*

guaranty and suretyship. It has been decided that a guarantor is not liable on a guaranty for advances to be made or credits to be given, from time to time, after a change of the original partners; and that a surety is not liable on a bond given by a principal and surety to a firm for advances made by the firm to the principal after the withdrawal or death of one of the partners. The ground of this decision is, that it is presumed the surety had regard to the character of the persons composing the firm, and it may have been that the partner, dying or going out, was the one on whose prudence and integrity he relied not to make imprudent advances. Upon the same general principle, bonds given by sureties to partners for the fidelity and good conduct of clerks, agents, or other officers, will not apply as a security after any change of the members of the Partnership.

CHAPTER IV.

LANDLORD AND TENANT.

HIRING STORES, DWELLINGS, &c.

AFTER the terms of a partnership have been agreed upon, the next subject which comes in order for consideration is generally the selection of a store or building, in which to conduct the proposed business, and of a house in which to reside. The considerations which lie at the basis of a sound judgment in this selection, do not come within the scope of our present plan, but we may observe that as young merchants rarely have more capital than their business may require, it must be, as a general rule, more prudent for them to hire than to buy their stores and dwellings. The hiring of real property creates the relation of Landlord and Tenant, and the contract between them is known as a *lease*, whereby the Tenant becomes entitled to the possession and use of the premises, and the Landlord to a rent or income by way of compensation. The law prescribes no unvarying form in which leases shall be made, and they may be in writing under seal, or in writing not under seal, or they may be made verbally without writing; but in most of the States of this Union, the principles of the English Statute of Frauds have been re-enacted, especially the clause which declares that all leases not put in writing and

signed by the party, shall have the effect of leases or estates at will only, except leases not exceeding the term of three years. It is nevertheless advisable in all cases to have leases in writing, and to use the words "*demise, grant and farm let,*" which have a technical meaning and are well understood.

Though the free and undisturbed possession of the premises be the object most important to Tenants, and the prompt payment of the rent the one thing principally esteemed by Landlords, it is nevertheless usual and prudent to insert in leases other stipulations, to some of which we will advert. We will regard the law as to these stipulations, first with the eyes of a Landlord; and secondly, with those of a Tenant.

I. FOR LANDLORDS.

1. *Specify in the lease the period when the tenancy shall commence, its duration, and the days when the rent shall become due and where payable.*

Difficulties frequently arise as to the period of the commencement of a tenancy, particularly tenancies from year to year, where a notice to quit must be given within a prescribed time in order to entitle the Landlord to possession. As to the *duration* of a tenancy, if no certain time be expressed in the lease, the law will construe it to be a tenancy from year to year. And if no time be stated for the payment of the rent in a lease for a year, it has been decided that, as the contract is entire, the rent is not due till the end of the year.*

* By the *New York Revised Statutes*, if lands or tenements be occupied, in the city of New York, without any specified term of

Where it is intended that the rent shall be payable *in advance* the intention must be specified clearly, for where "a house was let at a yearly rent, payment to commence on a particular day, and to be paid three months in advance, such advance to be paid on taking possession, it was held that this advance was to be confined to the first quarter only; for if it had been the intention of the parties to make it payable in advance, it ought to have been said '*always payable in advance.*'" (2 Starkie, 61.)

2. *Specify clearly, in a lease for years, the conditions upon a breach of which the lease may be avoided, and the means by which the Tenant shall be divested of his interest in the premises granted.*

It is a grantor's right and privilege in all cases to annex what conditions he pleases to his grant, provided they be not illegal nor repugnant to the grant itself. In a lease for years, which means a lease for at least two years, it is usual for the lessor to provide that in case the lessee fails to pay the rent when due, or commits waste, or alienates the estate without consent of the lessor, the lease shall be void, and the lessor may re-enter and repossess himself of the premises. But as the forms which the law requires to be observed in order to make a re-entry effectual are strict, it is politic to provide and agree further that they shall be waived and dispensed with.*

duration, the occupation is deemed valid until the first day of May next after the possession under the agreement commenced, and the rent is deemed payable at the usual quarter days, if there be no special agreement to the contrary.

* In making a re-entry for *non-payment of rent* the law requires,—1. "There must be a *demand* of the rent. 2. The de-

3. *Do no act which shall disturb or deprive the Tenant of the beneficial enjoyment of the premises leased.*

A Landlord who enters wrongfully into demised premises, and expels or evicts the lessee from any part thereof, cannot recover by law any portion of the rent till the Tenant is restored to the whole possession; for it is said the lessor ought not to be able so to apportion his own wrong as to oblige the Tenant to pay any thing for the residue. When the entry is lawful, particularly when authorized by the Ten-

mand must be made *for the sum actually due*, for a demand of more or less will avoid the entry. If a part of the rent be paid, a re-entry may be made for the part unpaid. 3. It must be made *on the day* when the rent is due and payable by the lease to save the forfeiture. 4. It must be made a short time *before sunset*, that the money may be counted and a receipt given while there is light enough reasonably to do so. 5. It must be made *upon the land*, and at the most notorious place of it, unless a place is appointed where the rent is payable, in which case a demand must be made at such place, for the presumption is that the Tenant is there to pay it. 6. A demand must be made *in fact* although there be no person at the place of demand ready to pay it. 7. When these prerequisites have been observed by the lessor or reversioner, and the Tenant neglects or refuses to pay the rent in arrear, if no sufficient distress can be found on the premises, the lessor or reversioner must re-enter. This is done by going openly upon the premises before the witnesses he may have prepared for the purpose, and declaring that for want of sufficient distress, and because of the non-payment of the rent demanded, mentioning the amount, he re-enters and repossesses himself of the premises.

"A tender of the rent on the last day either on or off the premises will save the forfeiture; and even when it has been incurred, the lessor may either by his express agreement, or by his acts, waive the forfeiture; as for example when the lessor receives rent from the lessee which has accrued since the forfeiture took place."
—*Bouvier's Institutes*, s. 1794.

ant himself, the rule is otherwise, and the rent shall be apportioned. (1 Yeates, 176.)

Any other act of misconduct by the Landlord, which justifies the Tenant to leave the premises, will deprive the lessor of the rent after such act.

4. *When desirous to terminate a tenancy from year to year, be careful to give the Tenant a proper notice, within the time prescribed by your Statute Law, to quit the premises.*

All general tenancies are tenancies from year to year. Where no certain term is agreed on, or if the Tenant hold over by consent given either expressly or constructively, after the determination of a lease for years, it is held to be a tenancy from year to year, and each party is bound to give reasonable notice of an intention to terminate it. In England the rule is to give a six months' notice, and such is the rule, we understand, in New York, Vermont, Kentucky, and Tennessee; but in Pennsylvania and some of the other States, a notice of three months is sufficient. Chancellor Kent remarks, that "justice and good sense require that the time of notice should vary with the nature of the contract and the character of the estate. Though the Tenant of a house is equally under the protection of notice as the tenant of a farm; yet if lodgings be hired, for instance, by the month, the time of notice must be proportionably reduced."

A Landlord's notice, to be certainly valid in law, should be in the form of a *written request*, signed by him or his agent, properly appointed, and directed to the Tenant, to quit the premises, describing them with particularity, and deliver the same to the

Landlord, on a day certain therein mentioned ; and when there is any doubt as to the time when the lease is to expire, it is proper to add "or at the expiration of the current year of your tenancy." The notice should be dated and delivered, in the presence of witnesses, to the Tenant personally, or if he cannot be found, to a member of his family at his place of abode, or on the premises to the Tenant in possession. A duplicate of the original notice should be reserved by the Landlord ; and in order to identify the notice in case of a dispute, the witness or witnesses ought to indorse on such duplicate the time and the manner in which it was served, and sign their names.

The words of a notice must be clear and decisive, without any ambiguity, or giving an alternative to the Tenant, as "you are required to move or pay ten per cent. more rent;" for if it be really ambiguous or optional, it will be invalid. Where two or more persons are jointly interested in the premises, they all must join in the notice ; and where two or more persons occupy the premises jointly, the notice should be addressed to all. Where the premises have been underlet or assigned, the notice should be given to the Tenant of the party giving the notice, and if the lessor has recognized the Sub-Tenant as his Tenant, a notice should be given to both.

Where the lease is for one or more years, or any fixed definite period, to expire at a certain time, a notice to quit before expiration of the term is unnecessary ; but in Pennsylvania, it is provided that if the Tenant holds over, the Landlord may give him

notice, and three months after such notice he may evict him.

In order to enforce payment of rent the Common Law of England gives to a Landlord, in addition to his right of action for debt, a summary process in the *right of distress*. This means, that when rent is due and unpaid he may seize, without legal process, the goods found upon the premises, and hold them as a pledge for the payment of his demands, and after observing certain prescribed forms, sell them. As a general rule he need not inquire whether the goods found on the premises belong to the Tenant or to other persons; but if they have been placed there by the proprietor from *necessity*, as the goods of a boarder, or for *commercial purposes*, as goods on a wharf or in a warehouse, they are not liable to distress.

The Common Law right of distress prevails in several of the States of this Union, but its efficacy as a speedy remedy has been materially impaired by the numerous legislative enactments protecting certain goods, or goods to a certain amount, from distress or execution.*

* In some of the States of this Union the essential parts of the Statute and Common Law of England have been adopted in relation to distresses; this is the case in Pennsylvania, New York, New Jersey, Delaware, Indiana, Illinois, Maryland, Virginia. In Kentucky, Florida, Texas, and Georgia, and perhaps some other States, the right of distress exists, but it is placed under some wise restrictions. The Landlord must make application to a judge or other officer designated by the law, make oath that the rent is due, and obtain a warrant from him, by virtue of which a distress is made by a sheriff or constable. In Massachusetts, Alabama, Mississippi North Carolina, Ohio, the right

In some States, where the right to distrain exists, a Landlord has a preference over other creditors as respects the goods on the demised premises, and by handing the assignee of an insolvent debtor, a notice of the amount of rent due, the goods cannot be removed until the rent is paid.

II. FOR TENANTS.

1. In negotiating with the owners of real property, it sometimes happens that the parties proposing to use the premises obtain promises and concessions which may be very valuable to them; but which they neglect to have inserted as stipulations or covenants in the written contract. A written lease is the best evidence of the agreement between a Landlord and Tenant, and therefore it is highly important for Tenants, first, to observe that *all those stipulations which have been verbally agreed upon, and which they deem favorable to themselves, are inserted in the lease.* Thus, if the Landlord has agreed to renew the lease on the expiration of your present term, have a covenant of renewal inserted in the lease, and note that it is not expressed in terms too indefinite to be enforced "as to renew on such terms as may be agreed upon," which has been held void for uncertainty. Where the Landlord has agreed to put the premises "in repair," or "in good habitable order," have a provision inserted to

of distress does not seem to prevail. And in North Carolina it has been judicially declared to be of no force in that State. In the New England States where they attach property on original or mesne process, the law of distress for rent, as practiced in England, does not exist.

this effect, and it may be greatly to your interest to add to this, that in case of failure to repair, you shall be acquitted of the rent. A Landlord is under no implied legal obligation to repair, nor will the uninhabiteness of a house or the uselessness of a building for the Tenant's purposes be any defence to an action for the rent, where the Tenant has expressly covenanted to pay it. Even if the Landlord has expressly covenanted to repair, but failed to do so, a Tenant may commence an action for damages, but he cannot withhold the rent without a provision to this effect. If the premises, however, be made uninhabitable by the Landlord's fault, after possession had by the Tenant, a different rule would probably apply.

2. If it has not been agreed that you, as Tenant, shall pay the taxes, you are not bound to do so; but *be careful that no clause be inserted in the lease which may, by construction, be interpreted to impose an obligation to pay the taxes.* Thus, in a case where the lessee had covenanted to pay the rent, "free from all taxes, charges, or impositions;" and in another, where he had agreed to pay a "net rent," it was held he was bound to pay the taxes.

3. Take heed that the lease does not contain an *unconditional covenant on your part to repair*, or to redeliver the premises in good order, or you may be compelled to make good all deterioration arising from natural decay; and if the building be destroyed by fire or otherwise, you may be compelled to rebuild it. In the absence of a covenant to repair, a Tenant is only bound to repair injuries occasioned by his voluntary negligence, as to put in windows

and doors that have been broken by him ; and under a general covenant to repair, with the express exception of casualties by fire or the elements, he is not bound to leave the tenement in a better state than it was when he entered it.

4. Have a provision inserted in the lease, that the rent shall cease, or proportionably abate, while the premises are wholly or in part unfit for use ; otherwise, if the premises be accidentally destroyed by fire, and the Landlord does not rebuild, you may, nevertheless, be compelled to pay rent until expiration of the term agreed upon.

5. *Do not dispute the title of your Landlord.*

A lessee who disaffirms the title of his lessor, as by suing out a writ or resorting to a remedy, which supposes him to have a higher interest in the premises, forfeits his lease. And a Tenant, who disclaims the tenancy, as by refusing to pay rent on the ground that another had ordered him not to pay it, or by getting up a title hostile to that of the Landlord, or assisting another to get up such a claim, may be treated as a trespasser, without notice to quit. But such a disclaimer, it is held, must amount to a direct disavowal of the relation of Landlord and Tenant, or a distinct assertion of a right or claim incompatible with such a relation, or it will not obviate the necessity of the notice. Thus, a mere refusal to pay rent, or to acknowledge a particular person as Landlord until further information be given that he is actually so ; or the mere payment of rent to a third person, unaccompanied with any assertion affecting the right of a Landlord,

would not be a sufficient disclaimer to render a notice to quit unnecessary.

5. *Pay the rent on the day when due.* A Tenant is bound to tender the rent on the day when due; and at the place of payment stated in the lease, or if no place be fixed, on the land, or to the Landlord in person off the land. A tender of rent late in the evening of the day on which it was due, has been held a good tender.

6. *Pay the rent to the party entitled to receive it, and consequently authorized to give a valid acquittance.*

Between the original parties to a lease, the lessor or his agent, properly authorized, is the party entitled to receive the rent and give an acquittance.

But it sometimes happens, that the reversioner sells or devises the estate, subject to the lease, in parts to different persons, and the lessee or Tenant is then bound to pay each his proportion of the rent. So where property is held by *Tenants in common*, each is entitled to receive his proportion of the rent, but if held by *joint Tenants*, one can give a discharge that will be binding on his companions.

7. *Use the premises in a tenant-like manner and commit no waste.* Waste is the legal term for the spoil or destruction in houses, gardens, or trees to the injury of the owner. It is of course waste to pull down a house unless a new and more valuable one be erected in its place; and it has been said, that it is waste to build a house where there was none before—but this is doubted. It is waste to remove floors, furnaces, windows, window-glass, doors, shelves, or other things once fixed to the freehold, whether they were built by the owner or the Ten-

ant, except fixtures erected for the purpose of trade. It has been decided to be waste to convert a parlor into a stable, a grist-mill into a fulling-mill, and to turn two rooms into one. Where the Tenant is bound in an implied or express covenant to repair, all destruction to the premises caused by his neglect to make repairs is waste, for which he is liable in damages, or for which, if so agreed, his lease may be forfeited.

8. *Remember that after assigning a lease in which you have covenanted to pay rent, you continue liable to the lessor on that covenant, and consequently it is to your interest to secure a responsible assignee.* But if the assignee sell or transfer his term, he is no longer personally liable, for he never covenanted to pay the rent, and is responsible for it only as respects the land.

Upon the expiration of a lease, a difficulty not unfrequently occurs between a Landlord and Tenant, in determining which of those things that the latter has annexed to the freehold, he retains the right of removing; or, in other words, what are fixtures? Legal authorities seem to have found equal difficulty in agreeing upon any consistent and clearly defined principles of general application, by which the question may in all cases be solved. "Fixtures belong to that class of property," observes C. J. Bartley, "which stands upon the boundary line between the two grand divisions of things, real and personal, into which the law has classified property; a distinction not merely artificial, but founded on reason, and the nature of things—regarding not only the natural qualities of immobility on the one hand and mobility on the other, but also the legal

constitution and incidents to which each class respectively is subject. In the great order of nature, when we compare a thing at the extremity of one class with a thing at the extremity of another, the difference is glaring; but when we approach the connecting link between two great divisions, it is often difficult to discover the precise point where the dividing line is drawn." In modern times, courts have adopted a rule of construction more strongly in favor of the Tenant, and against the Landlord, than formerly; and more so in respect of things established for purposes of trade or manufacture than for other things. The question, what are fixtures? frequently arises between sellers and purchasers, and between heirs and executors; and in many of those cases, it is apparently determined upon different principles. But between Landlord and Tenant, the modern rule seems to be that "*what a Tenant has added he may remove, if he can do so without injury to the premises, unless he has originally built it in,*" or otherwise manifested an intention to make it an integral part of what was there originally.

Parsons, in his admirable work on Contracts, has given the following summary of *all* the things which have been held removable, and of those which have been held not removable, but prefaces it with the caution,—“It must be remembered that each decision rested more or less upon the peculiar circumstances of the case, and may fail as authority when applied to another case which apparently resembles it.” 1. Things held not to be removable:—agricultural erections; ale-house bar; barns fixed in the ground; beast-house; benches affixed to the house; box-borders not belonging to a gardener by trade; carpenter's shop; cart-house; chimney-piece not ornamental; closets affixed to the house; conduits; conservatory substantially affixed; doors;

dressers; flowers; fold-yard walls; fruit trees, if tenant be not a nurseryman by trade; fuel-house; glass-windows; hearths; hedges; locks and keys; millstones; manure; partitions; pigeon-house; pimeries substantially affixed; pump-house; trees; wagon-house.

—2. Things held to be removable though not coming within the class of trade fixtures:—arras hangings; barns resting by weight alone upon foundations let into the ground or upon blocks; beds fastened to the ceiling; carding-machines; chimney-pieces, ornamental; coffee-mills, cornices, ornamental; fire-frame; furnaces; grates, if removable without injury to the premises; iron backs to chimneys; looking-glasses; malt-mills; movable boards, fitted and used for putting up corn in binns; mills on posts; ornamental fixtures; pumps slightly attached; rails and posts; stables on rollers; stoves; tapestry; windmills on posts; window-blinds.—Trade fixtures held to be removable: brewing-vessels; buildings accessory to removable trade fixtures; cider-mills; colliery machines; coppers; Dutch barns; engines; salt-pans; shrubs planted for sale; soap-works; steam-engine; stills; trees planted for sale; varnish-house; vats.

CHAPTER V.

OF BARGAINS.

FORMING, CONDUCTING, AND DISSOLVING CONTRACTS.

MAN has been defined by some philosopher "to be an animal that makes Bargains." Whether the definition be strictly accurate or not, it is at least certain that a very large and influential portion of mankind are almost constantly engaged in making Bargains; and an abstract of the important events in the lives of a majority of our countrymen, in particular, would be little more than a recital of successful and unsuccessful Bargains. Dexterity in bargaining is not only an accomplishment, but a power. Under another name it has performed an important part in exterminating savages, gaining conquests, and extending civilization; and by transferring to the strong what is useless to the weak, it accelerates the development of material prosperity. In modern times the polished wit, more frequently than the polished blade, decides the destinies of nations as well as of individuals.

The term Bargain, strictly considered, is properly applied only to agreements concerning the sale of property. A contract is legally defined to be an agreement, between two or more persons, to do or not to do a specific thing. An agreement which is *under seal* is called in law a *specialty*; all other

agreements, whether oral or in writing, are designated *parol agreements*.

The privilege of making such Bargains and contracts as may seem best to the persons interested, is a natural right, which should not be abridged except for good and sufficient reasons, and the common law has therefore adopted as one of its fundamental principles the maxim, that *the form of agreement and the convention of the parties overrule the law*. That is, in a given case, the law will apply its established rules in the absence of any agreement between the parties to the contrary, but if there be such an agreement it will generally enforce that, even to the setting aside of its established rules. The principal restriction or qualification to this liberty of private contract, is where the *interests of the public or of morality are affected and may be injured by the contract*. The law will not permit individuals to make just and legal between themselves that which it has expressly declared to be unjust and illegal. For instance, it is a general rule in the law of insurance that the insurers shall not be liable when the loss or damage happens by the fault of the assured, and the parties cannot overrule this established rule by agreeing that the policy shall cover all risks and perils with "no exceptions." It cannot be permitted that 'I can effectually contract with any one that he shall charge himself with the faults that I may commit.' So, an agreement to do an unlawful act cannot be supported at law, or in other words, no right of action can spring out of an illegal contract; and this rule applies not only where the contract is expressly illegal, but wherever it is opposed to pub-

lic policy, or founded on an immoral consideration. In those cases where both parties are in fault, the law simply favors him who is in possession. "If A agree to give B money for doing an illegal act, B cannot, although he do the act, recover the money by an action; yet if the money be paid, A cannot recover it." Money lost at play cannot be sued for as a debt, and if paid it cannot be recovered back.* Those who come into a court of justice to seek redress must come with clean hands, and must disclose a transaction warranted by law.

To constitute a contract valid in law, the two most important requisites are—*consideration and assent*. It is true, that the parties must be able to bind themselves by contract, and that certain persons, as infants, married women, insane persons, and persons grossly intoxicated, may, by proof of these facts, be excused from their contracts; but the law presumes the competency of the parties until the contrary be shown. But a consideration of some sort or other is absolutely essential to the

* Where money, deposited upon an illegal wager, has been paid over to the winner by the consent of the loser, the latter cannot afterward maintain an action against the former to recover his deposit; but if the contract be executory, and the plaintiff dissent from or disavow the contract before its completion, he may, on disaffirmance thereof, recover money paid over to the other party, under the common count—for money had and received, there being in this case a *locus penitentie* and the *delictum* being incomplete. (Chitty Cont. 3d ed., 637.) So, if money be deposited with a stakeholder in pursuance of a wager as to the event of a battle to be fought by the parties laying the wager, and it be not paid over—although the battle be fought—each party may recover his deposit from the stakeholder. (5 T. R. 405.)

forming of a contract that can be enforced in law; and an agreement to do a thing, or to pay money on one side, without a compensation therefor on the other, is considered an agreement on which no action can be sustained. A consideration is the very essence of a contract *not under seal*, both at law and equity, and must exist although the contract be reduced to writing. Accordingly, a promise by one man to pay another money without receiving some benefit therefor, cannot be enforced if the money be not due him, though made in writing or in the presence of a dozen witnesses. Hence, if I have sold goods to A on credit *without your special request*, and you afterward guarantee the debt without receiving any consideration for so doing, the guarantee is legally valueless. Hence, if you owe me \$100 and pay me \$50, receiving a receipt in full of the debt and of all demands, this may be no bar to the recovery of the balance.*

* "A promise to take a less sum in satisfaction of a greater is without consideration and void; and after taking it, and agreeing to discharge the debtor, the creditor may recover the balance. But if a sealed acquittance be given in satisfaction of the whole, on receiving part; or if the debtor pay a less sum, either before the day or at another place, and the creditor receive it in full satisfaction, the law is different. So if a creditor receive some specific article in satisfaction, though it be of much less value than the whole sum due. If on the faith of a creditor's agreement to accept a part of his debt in full satisfaction, a third person is induced to become surety for the debtor, on the ground that he will be discharged on easy terms: or other creditors are induced to relinquish their demands on the debtor—the creditor cannot recover the balance, as it would be a fraud on the surety or other creditor. In some of the cases, the plaintiff failed to recover the residue of his debt, on the ground that his agreement

The only exception to the rule that a consideration is essential to the validity of a contract is negotiable paper, which has passed into the hands of an indorsee, without notice, before maturity, and in the usual course of trade. The immediate parties to a bill or note, and the indorsee, after maturity, equally with parties to other contracts, are affected by a want of consideration. Consequently, a note given by the maker for the accommodation of the indorser, is valid in the hands of a *bona fide* holder who received it before maturity and without notice; but the indorser himself cannot sue the maker upon it, because he gave no consideration for it.

But though a consideration sufficient to support a contract must be in its essence a *valuable* one, it need not be money, nor in any wise adequate to the thing to be done. A consideration of one dollar may, without fraud, support a contract involving thousands of dollars.* The legal test of a valid consideration is usually stated to be *some benefit to the party promising, or some injury to the person receiving the promise*. Hence, if A promise to pay B a sum of money to settle a lawsuit, or to forbear to sue in a case where the result would be doubtful, the promise would be binding; for the prevention of litigation is assumed to be a benefit to both parties, and at all events it is a highly favored consideration in law. So, if you agree to pay a debt, which

had induced the debtor to make an assignment of all his property, and a recovery would be a fraud on him."—*Am. Jurist*.

* In reducing a contract to writing, where the consideration expressed is a *nominal* one, it is advisable to add the words "and for other good and sufficient considerations."

would be barred by the statute of limitations, or from which you were discharged by a bankrupt law, the previous legal obligation will be considered a sufficient consideration for the subsequent promise. But where a man makes a promise under a mistake, supposing himself to be under an obligation which the law does not impose, he is not bound by such promise. A promise from one party may also be a good consideration for the promise of another, where both are simultaneous and intended to be reciprocally binding; as, where I promise to *sell* and *deliver* certain goods, and you promise to *pay* for and *accept* the goods—your promise is a good consideration for mine, and I must deliver them. So, if one promise to teach another a trade, and the other promises to serve him a certain time, each promise is a consideration for the other; but if the agreement be all on one side, as an agreement to serve without a promise to pay or to teach, it is void for want of consideration. The obligation must be reciprocal to bind either party. It is, perhaps, unnecessary to say that if a consideration be illegal, or fraudulent, or impossible, or turn out to be a mere nullity—that is no consideration at all—the contract based upon it falls to the ground.

The *assent of the parties* is the other requisite essential to the validity of all contracts. This proposition seems self-evident; but it may be observed that the assent must be mutual, relating to the same thing in the same sense. Hence, in a case where shingles were sold and delivered “at \$3.25,” but there was a dispute as to whether the \$3.25 was for a bundle or for a thousand—it was held that unless

both parties had understandingly assented to one of these views, there was no special contract as to the price. Where the negotiation is conducted by letter, the contract is complete when the answer containing acceptance is dispatched by mail or otherwise; provided it be done with due diligence after the proposal and before any intimation is received that the offer is withdrawn. On the other hand, if A makes an offer to B, and gives him a specified time for an answer, A may retract it at any time before the offer is accepted, because both parties had not yet assented to it, and consequently it was not a contract.

Marriage, by our law and the law of England, is considered in the light of a contract; hence the maxim, *consent, not concubinage, constitutes a valid marriage.*

With regard to the *construction* of contracts, the general rule is, that the *laws of the place where a contract is made, or is to be performed*, control its construction and decide its validity. A contract valid in the place where it was made, or in which it is to be executed, is by public law and tacit assent valid everywhere. But the remedies for a breach of the contract must be regulated according to the law of the place *where the action is instituted*; hence the statute of limitations of the State in whose courts a suit is instituted, prevails in all actions. Where a proposal to purchase goods is made by letter sent to another State, and is there assented to, the contract of sale is made in that State, and if it is valid by the laws of the latter State, it will be enforced in the State whence the letter is sent, even though invalid if it had been made there.

A similar rule is adopted in the *interpretation of doubtful or ambiguous contracts*, it being presumed that the parties, when making the contract, had in view the law and custom of the place or country in which it was made. "It seems to be an undisputed doctrine," says Parker, C. J., "with respect to *personal* contracts, that the law of the place where they are made shall govern in their construction except when made with a view to a performance in some other country, then the law of such country is to prevail." Hence a note made in England promising to pay 100 *pounds* would mean 100 pounds sterling, and a like note made in America would mean 100 pounds American currency, which is about one fourth less in value. If, however, the note, though made in America, be payable in England, it would be interpreted to mean 100 pounds sterling. This construction is really nothing more than a natural sequence from the great and leading rule adopted by both courts of law and of equity in the interpretation of contracts, that the mutual intention of the parties shall in all cases prevail. Ordinarily, plain words are to be taken in their popular and ordinary meaning, and technical words in their technical sense; but to arrive at the intent of contracting parties, the law will even contravene the literal terms of a contract and make the words subserve their intention. To attain this end, however, it has never gone so far as to admit parol evidence to supply or contradict, enlarge or vary, the words of a written contract. "Parol evidence is received" says Kent, 2, 552, "when it goes, not to contradict the terms of a writing, but to defeat the whole contract as being fraudulent

and illegal; for then it shows that the instrument never had any valid operation: and this rule is supported on grounds of policy and necessity. So when a contract is reduced to writing, all matters of negotiation and discussion on the subject, antecedent to and *dehors* the writing, are excluded as being merged in the instrument."

Verbal evidence may be admitted to *explain* but not to vary a written contract.

In executing contracts, the law simply requires of all the parties the observance of good faith, and to ensure this, it has enunciated that *no man shall take advantage of his own wrong*. It will not permit one to induce another to enter into an agreement, and then by rendering performance impossible recover damages for non-performance. "If a man be bound to appear on a certain day, and the obligee put him in prison, the bond is void." The cases, however, of most frequent occurrence to which the maxim cited is applicable, are those in which one of the parties to a contract or other transaction has been guilty of fraud, and no principle in the law is more firmly established than that a wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it. The maxim is also the foundation of the law of *tender*. A creditor who refuses a tender sufficient in amount, and duly made, cannot afterward, for the purpose of oppression or extortion, avail himself of that refusal. The debtor, it is true, remains liable to pay whenever required to do so, but the tender operates in bar of any claim for damages and interest for

not paying the debt, and also in bar of the costs of an action brought to recover it.

Another principle which the law has established with respect to contracts is, that *he who derives the advantage, ought to sustain the burden*. Accordingly a tenant who takes an assignment of a lease, in which there is a covenant on the part of the lessee to repair, is bound by it, although he himself has not covenanted to repair. So, a *dormant* partner in a firm, when discovered, is equally with the others liable for the debts, for, by taking a part of the profits, he lessens the fund on which the creditor relied for payment. Upon the same principle it is held that a party who adopts a contract which was entered into without his authority, must adopt it altogether. He cannot ratify that part which is beneficial to himself and reject the remainder; he must take the benefit to be derived from the transaction with the burden.* The converse of the above maxim also holds, and is occasionally cited and applied: *he who bears the burden ought to derive the advantage*.

Again, the laws assist those who are vigilant, and

* The preceding instances have been selected from the law of contracts, but the rule in question applies very generally to other cases. An innkeeper, for instance, was requested by his guest to allow him the use of a private room to show his goods in; and to this request the innkeeper acceded, at the same time telling his guest that there was a key, and that he might lock the door, which however the guest neglected to do; *it was held* the jury were justified in determining that the plaintiff received the favor *cum onere*; that is, that he accepted the chamber to show his goods in upon condition of taking the goods under his own care. (*Burgess v. Clements*, 4 M. & S. 306.)

not those who sleep over their rights. This is a principle well known and applicable in a great variety of cases. Where two writs of execution against the same person are delivered to a sheriff, he is bound to execute that writ first which was first delivered to him, even though both were delivered upon the same day. In the collection of debts "the using of legal diligence is always favored and shall never turn to the disadvantage of the creditor." In order to enforce diligence, and punish negligence, in suing for claims, statutes have been passed prescribing a time within which actions must be brought; and if the claimant suffer that time to elapse, his claim, however just, cannot be received or enforced. These are known as the Statutes of Limitations. The law considers that debtors ought not to be obliged to take care forever of the acquittances which prove a demand to be satisfied; and it is proper to limit a time beyond which they shall not be under the necessity of producing them, or in familiar phrase, after which they are "outlawed." In the United States, each State has its own statute of limitations, differing generally from that of its sister States, and therefore we can only advise the reader to be vigilant always in the collections of his claims, or "keep posted" as to the statutes of limitations of the States where his debtors reside.

Lastly, in *dissolving contracts*, the law requires that it *shall be done by the same means that rendered it binding*, that is, where the agreement is *under seal* the release or discharge must be under seal likewise, and where the contract is required *by law to be in writing*, though not under seal, it cannot be dissolved

by a subsequent verbal agreement. But where the law has not required a contract to be in writing, a subsequent verbal agreement constituting a new contract, may waive, dissolve, or annul a former written agreement.

Having thus stated the leading principles applicable to all contracts, we shall proceed to consider a peculiar but extremely important class of contracts, distinguished as **CONTRACTS OF SALE**.

The common law, which requires, in the sale of lands, the observance of solemn forms and writings under seal, demands nothing more to constitute a sale of goods or chattels than an agreement between the parties that the property shall pass from the owner to the purchaser, for a price given, or to be given. A transfer without a price is a *gift*; and a transfer of one parcel or kind of goods for another, is an *exchange*. In a sale, three elements are included—*a thing which is the subject of the sale, a price, and the consent of parties*. The thing sold must have an actual or potential existence, and must be capable of being delivered; otherwise it is not a valid sale. If I agree to sell you a horse which happens to be dead, or goods in a warehouse which are destroyed by fire, circumstances of which both of us were then ignorant, the sale is void. And if a substantial part of a thing sold is destroyed, or does not exist at the time—both parties being ignorant of the fact—it is said that it is optional with the buyer to abandon the contract, or take the remaining part upon a reasonable abatement of the price. The price must be *certain* to constitute a sale, or be capable of being made certain. If no price be agreed upon, the law

will establish a reasonable price, and generally according to the market value of the goods at the time of the agreement. Lastly, there must be a *mutual and complete assent of the parties* respecting the subject of the sale, the price, and the fact that it is a sale.

At Common Law, the agreement of the parties to a sale could be proved as any other parol contract might be; but in the reign of Charles II. a statute was passed to prevent frauds and perjuries, commonly called the Statute of Frauds, which materially altered the Common Law of sales, particularly with regard to the mode of proof. The 4th section of this celebrated statute enacts, among other things, that no action shall be brought whereby "to charge any person upon any agreement, that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged," or his lawfully authorized agent. And by the 17th section of the same statute, it is enacted that no contract for the sale of any goods, wares, and merchandises, for the price of £10 sterling or upward, shall be allowed to be good, *except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing, of the said bargain, be made and signed by the parties to be charged by such contract, or their agents.* All the States of this Union, excepting Louisiana, it is said, have substantially re-enacted these provisions

of the English statute; though the sum limited varies in the several States, from \$30 to \$50; and hence a contract for the sale of goods of a greater value than the sum specified in the statutes cannot now be enforced either by the buyer or the seller, though made in the presence of a hundred witnesses, and in the plainest and most positive terms, unless there be some written memorandum signed by one or both of the parties, or the buyer accept part of the goods sold, or give something in earnest, or pay part of the price. What *may* be a sufficient delivery and acceptance of goods sold to answer in lieu of a written memorandum, and what *may* be a sufficient memorandum in writing to answer the requirements of the statute, are questions that have perplexed courts to decide perhaps as much as any other points in mercantile law. What *will*, undoubtedly, and under all circumstances, make a valid contract of sale we will endeavor to state, with other important considerations, in the subsequent chapters on the buying and selling of goods.

CHAPTER VI.

BUYING GOODS.

POINTS WHICH THE LAW REQUIRES PURCHASERS TO OBSERVE.

To persons about to purchase property, whether merchandise or real estate, the common law gives a very impressive and ominous warning—CAVEAT EMP-TOR—*let the buyer beware*. This admonition has been posted up on the law of sales almost as conspicuously as those notices with which railroad companies occasionally edify the blind and the deaf, "Look out for the locomotive when the bell rings!" and like them it is sometimes seen only when the danger is too imminent for escape. The introduction of *caveat emptor* as a law maxim was no doubt intended to ensure certainty in the law by compelling purchasers to bear the consequences of their bad bargains under all circumstances, excepting manifest fraud. The result, however, has been directly the opposite, and so great is the uncertainty which it has occasioned, that nothing less than omniscience can now foretell the result of a lawsuit between a buyer and a seller, even where the facts are not disputed. Courts, in their anxiety to do substantial justice between man and man, have gone on multiplying exceptions to the general rule, until the decisions have become a mass of irreconcilable contradictions. In the lan-

guage of C. J. Gibson, "An attempt to arrive at a satisfactory conclusion about any principle, supposed to be settled by them, would be useless if not absurd. Of such jarring materials have they been compounded, that it is impossible to extract from them any principle of general application, and we are left by them in the position of mariners compelled to correct their reckoning by an observation." Some authorities have ventured the opinion that the law now occupies a middle ground between the common law maxim which requires the *buyer* to beware, and the civil law maxim which requires the *seller* to beware, and that the seller is held to the strictest good faith in all that he says or does at the time of sale, while the buyer must bear the responsibility for any foolish mistakes or wrong conclusions that may result from trusting to his own judgment. As a rule in business, however, this subtlety is dangerous, if not valueless; and in buying goods or other property the only safe ground that we can stand upon is to assume that the maxim of *caveat emptor* is in full force and vigor. Then,

I. *Before purchasing goods, not in the possession of the seller, ascertain that he can give you a good and unincumbered title to them.*

In the sale of lands the rule of *caveat emptor* applies whether the seller is in or out of possession. The buyer is bound to inspect the title at his peril, and if it turn out to be defective he has no remedy, unless he take a special covenant or warranty, provided there be no fraud practiced upon him to induce him to purchase. And in every sale of a chattel, according to Kent, "if the possession be at the time in

another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril. But if the seller has possession of the article, and he sells it as his own and not as agent for another, and for a fair price, he is understood to warrant the title." We think, however, that the law will soon be, if not already settled differently; and a seller who affirms a chattel to be his, will be bound in all cases to answer for the title.

After purchasing goods in the possession of a third person, the buyer should either take them immediately into his own possession, or give notice to the holder of them that he has purchased them, and after such notice the possessor will part with them at his peril.

II. *Where it is possible to inspect or examine the goods you design to purchase, satisfy yourself as to their condition and quality by a thorough personal examination.*

The common law requires the purchaser before he makes the contract to examine for himself those qualities of the articles that he buys which are within the reach of his observation and judgment, or if he neglect to do so, and is deceived without fraud or warranty on the part of the seller, he has no remedy at law or equity. A buyer's senses are his best friends. If a man offer to sell you wine that may be corrupted, or a horse that may be diseased, your taste and your eyes must be the judge, and you purchase at your peril. The following case illustrates the point. A wine merchant had sold to a customer ten dozen of burgundy, and about a year afterward the customer applied to have a portion of it exchanged for the same quantity of champagne, which was at the

same price. The plaintiff agreed to this, and the exchange was effected. When the burgundy was sent to the customer it was of the first quality and in the best condition, but when it was returned it was found to be sour, and fit only to be used as vinegar. The wine merchant, not being well advised, resorted to an action to recover the price of the champagne, or compensation for the bad condition of the burgundy. On the trial, however, he could not prove any representations by the defendant, respecting its condition, and Lord Ellenborough held that "without evidence of an express warranty, or of direct fraud, the action could not be supported, and that *caveat emptor* applied to this case. Plaintiff nonsuited."

This rule is applicable in all cases where goods are open to the examination of the purchaser, and nothing but an express warranty will alter this conclusion of the law. The price paid is no guaranty of the value of articles purchased. Without warranty, in cases where the buyer has opportunity to examine goods, it has been decided the seller is not bound to furnish even a merchantable article. In *Wright v. Hart*, 18 Wend. 449, it appeared that the plaintiff had bought of the defendant a quantity of flour for which he had paid him the price of "No. 1 flour;" but on trial it was discovered that it was made of *grown wheat*, and therefore unfit for ordinary bread, and unprofitable for making starch. The flour was sold as E. S. B., meaning E. S. Beach's brand, and it was really of this description, according to the weight of the testimony. The flour was also merchantable and fit for some purposes, being good for

hard and ship bread, and more than usually valuable to make paste for paper-hangers. Some witnesses, however, thought it was not merchantable, nor good for any purpose. The plaintiff was a manufacturer of starch, and had several times purchased flour of the defendant to be used for this purpose, but there was no evidence that he did so in the present instance. Held that the defendant was not liable as on an implied warranty, and *caveat emptor* was the rule.*

The exception to the general rule is that *where it is not possible for the buyer to examine goods*, the law compels the seller to impliedly warrant that they are merchantable.

III. Another caution implied in the maxim *caveat emptor* is, *not to trust to the assertion of the seller as to the market or real value of the article he offers for sale.*

Where there is neither a *warranty as to value*, nor a misrepresentation of any fact respecting the property, the law always presumes that each party has relied upon his own judgment. A naked assertion as to value, it is considered, does not imply knowledge, but must be understood as a matter of opinion. The difference between a false statement in a matter of

* "In South Carolina and Louisiana, the rule of the civil law is followed, and a sale for a sound price is understood to imply a warranty of soundness against all faults and defects. The same rule was for many years understood to be the law in Connecticut; but if it did ever exist, it was entirely overruled in *Dean v. Mason* in favor of the other general principle which has so extensively pervaded the jurisdiction of this country. Even in South Carolina the rule that a sound price warrants a sound commodity, was said to be in a state of vibration." 2 Kent, 481.

fact and a like falsehood in matter of opinion has been illustrated thus: if I, the owner of a house, affirm that *it will sell or let* for a given sum when in fact no such sum can be obtained for it, it is in its own nature a matter of judgment and estimate, and so the parties must have understood it. But if I falsely affirm that the house brings a rent of \$150 per annum, when in fact it is let for \$100, it is fraud, because I know the fact, and on inquiry by the buyer, the tenant might refuse to inform him, or give him false information.

IV. *In buying goods in bales, if not sold by sample, examine that the interior corresponds with the exterior.*

When hemp or cotton in bales is sold by *sample*, the seller impliedly warrants that the bulk shall be equal in quality and condition to the sample, but the rule is different where the buyer is told to *examine*, and does examine the bales. Thus, in the case of *Salisbury v. Stainer*, 19 Wend. 159, where it appeared that the plaintiff had purchased hemp of the defendant, and when it came to be worked, it was discovered that the interior of the bales was very different from the exterior, not only being of an inferior quality, but containing large quantities of tow. The court held "this was not a sale by sample. Salisbury was told to examine, and did examine the hemp for himself. He inspected the bales, cut open one of them, and was at liberty to open others, had he chosen to do so. If he was not satisfied with the quality and condition of the goods, he should have either proceeded to a further examination, or provided against a possible loss by requiring a warranty. Where the purchaser has an opportunity to

inspect the goods, no principle is better settled than that the seller in absence of fraud is not answerable for latent defects. The rule in such cases is *caveat emptor*. The judge erred in charging the jury that there was an implied warranty that the inside should correspond with the outside of the bales."

V. We have now seen that the first and general rule relating to contracts of sale, is that the purchaser buys at his own risk—*caveat emptor*. The exceptions to this rule are, where the seller gives an *express warranty*; or, *where the law implies a warranty from the circumstances of the case or the nature of the thing sold*; and thirdly, *where the seller has been guilty of fraudulent misrepresentation or concealment*. In these cases the responsibility falls upon the seller, and a full consideration of them more appropriately belongs to a subsequent chapter, in which we shall consider the duties and responsibilities involved in selling goods. Here, however, it is necessary to notice them in order to guard the buyer against placing a false construction upon their effect or attaching to them a greater importance than the law will justify.

I. EXPRESS WARRANTIES.

1. *Beware of trusting to an express warranty to cover defects which are apparent on a careless inspection or which are known to you at the time of purchase.* If you buy a horse manifestly blind, doubting your own eyes, because he is warranted sound, you cannot recover damages for the defect on the general warranty of soundness. If you buy a piece of cloth warranted to be blue, which proves to be brown, you

cannot recover on the warranty. But if you neglected to examine the article, or if you were unable from defective eyesight to detect the difference, the seller will be bound to the full extent of his warranty.

2. *If you intend to rely entirely on the warranty, see that it covers all you would guard against, for a seller is not bound beyond the actual terms of his warranty.* A man who gives an express warranty is bound to make it good to the letter of his engagement; but not beyond that. If in selling a horse, I say "I warrant him sound so far as I know;" or if I say "I never warrant, but he is sound as far as I know;" you can recover only by proving that at the time of sale *I knew* the horse to be unsound. In one case the warranty of a horse was in these terms: "Received of B £10 for a gray four-year old colt, warranted sound,"—it was held that the warranty was confined to soundness, and that without proving fraud it was no ground of action that the colt was only three years old.

A warranty limited as to time will not be binding after expiration of the time limited.

3. *Beware of trusting to a warranty made after the sale, for it is wholly without consideration, and consequently void.* A warranty to be binding must be made either before the sale, and with a direct reference thereto, or at the time of it. Generally a warranty of an article sold should be made at the time of sale; but if when parties first are in treaty respecting the sale, the owner offers to warrant the article, the warranty will be binding, although the sale does not take place until some days after-

ward. But whatever may be the language used during the negotiation of the sale, if the bargain is subsequently reduced to writing, the writing governs. If it contain a qualified warranty, or if it says nothing about the warranty, the buyer cannot set up a parol warranty. "Suppose the contract," said the Court, in the case of *Peltier v. Collins*, 3 Wend. 459, "had been with warranty, and the memorandum in the plaintiff's sales-book had been signed by the defendant, *but the warranty clause omitted*—and suppose the rice had been delivered and had proved to be of an inferior quality, could the defendant have shown the warranty by parol? The authorities to which I have referred show most abundantly that he could not. Is the rule of proof different where the memorandum is subscribed by the agent? Most certainly not."

When a negotiation of sale has been concluded, it is customary and proper for the buyer to obtain from the seller a bill of parcels; and if there be no other written memorandum of the sale, it is especially important for him to have all the terms of the contract expressed in this bill of parcels. Whether words of description in a bill of parcels, or receipt, or other written memorandum, amount to an express warranty, is not we believe clearly settled;* but it is settled that a bill of parcels with the seller's

* Story, in his work on Sales, § 358, says upon this point, that "The distinction between the cases seems to be, that where the description relates to a matter of opinion or judgment in respect to which there can be no certain knowledge from the nature of the thing, as in respect to the authorship of old pictures, it is a question for the jury to determine whether the description were

name written or printed upon it by his authority, is a sufficient memorandum in writing to bind him within the Statute of Frauds. A buyer, however, will not be allowed to prove by verbal evidence that the terms of the sale were different from those expressed in the bill of parcels. If, for instance, it was really a sale by sample, and consequently the

intended as a warranty, or as an expression of opinion merely. If it were intended as a warranty the seller must abide by it; or if it were intended solely as a matter of opinion, and so understood by the buyer, the seller is not bound by it unless he willfully deceived the buyer." * * * "But where the description is not necessarily dependent on opinion, but is within the knowledge, or the duty, or power of knowledge of the seller, his description is to be taken as an affirmation of fact and not of opinion; unless it be expressly limited to opinion. Thus, if a person undertake to describe an article as 'prime winter oil,' he is bound to make his description good; because he can ascertain whether it is 'prime winter oil' or not. The question is one of fact which he is bound to know, and which he can know if he chooses; and if he neglect to ascertain the fact, and thereby mislead the purchaser, he ought to be liable therefor."

In *Winsor v. Lombard*, 18 Pick. R. (Massachusetts), 60, Shaw, chief justice, said, "The old rule upon this subject was well settled, that upon a sale of goods, if there be no express warranty of the quality of the goods sold, and no actual fraud by a willful misrepresentation, the maxim *caveat emptor* applies. Without going at large into the doctrine upon this subject, or attempting to reconcile all the cases, which would certainly be difficult, it may be sufficient to say, that in this commonwealth the law has undergone some modification, and it is now held, that without express warranty or actual fraud, every person who sells goods of a certain denomination or description, undertakes, as a part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the species, kind, and quality thus expressed in the contract of sale. Indeed, the rule seems to be now well settled in England."

bulk warranted to be equal in quality to the sample given; but if the bill of parcels makes no reference "as per sample," he cannot claim a sale by sample. And if the article sold was expressly warranted, but the bill of parcels does not contain a warranty—the buyer cannot prove a warranty by parol evidence. So if the sale was upon credit, but the bill of parcels does not mention a credit, the seller may refuse to deliver without payment of the cash; for in the absence of an express agreement, or a usage to the contrary, the law presumes every sale to be a cash sale, and that the article sold is to be delivered and the price paid without delay.

II. IMPLIED WARRANTIES.

The law implies a warranty in five cases: 1. *That the seller has a valid title when the goods are in his possession.* The fact that he offers them for sale creates the reasonable presumption that he has a right to sell, and that the goods are his own unless the contrary be expressly stipulated. 2. *That the goods are merchantable when there is no opportunity for inspection,* as if they be sold before arrival, or if they are in the hold of a ship and the surface only can be seen. 3. *That they are reasonably fit for the purpose for which they are ordered or intended.* "If a man sells an article," says Chief Justice Best, "he thereby warrants that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it fit for that purpose." But when an order is given for an article of a certain and definite nature to be manufactured, the seller cannot be understood as warranting it to be appropriate to the use for which the

buyer intends it, whether he knows the intention or not. For instance, a man ordered "Chantry's smoke-consuming furnace" for a brewery; it was held that the seller could not be understood to warrant that the furnace was adapted to such use, but only that it was as good for the purpose as any answering to the description in the order. 4. "A warranty will be implied," says Story, "against all *latent* defects in two cases: 1st. When the seller knows that the buyer did not rely on his own judgment, but on that of the seller, who knew, or might have known, the existence of the defects. This exception to the general rule is allowed, on the ground that the seller, in such a case, is guilty of a constructive fraud; and however unintentionally, does, nevertheless, actually mislead the vendee to his injury. If, however, the buyer do not rely on the seller, and the seller be not aware of the existence of a latent defect, and do no act, and say no word in relation to the article sold which has a tendency to mislead the purchaser, the rule of *caveat emptor* would apply. He must, however, be very careful not to do or say any thing calculated in the slightest degree to mislead the buyer, or the contract will not be binding." 2d. The second class of cases in which a warranty is implied against latent defects is, "where, from the situation of the parties, the seller might have provided against the existence of any such defects; or where a warranty against them is implied in the very nature of the transactions—as in the case of a manufacturer or producer who undertakes to furnish articles of his manufacture or produce in answer to an order. The ground of this warranty is the implied trust

and confidence necessarily reposed in such cases in the vendor by the vendee, with the tacit consent of the former." 5. *Where goods are sold by sample, the law implies a warranty that the bulk corresponds to the sample in nature and quality.* "If the article be sold by the sample," says Kent, "and it be a fair specimen of the article, and there be no deception or warranty on the part of the vendor, the vendee cannot rescind the sale. Such a sale amounts to a warranty that the article is, in bulk, of the same kind and equal in quality with the sample. If the article should turn out to be not merchantable from some latent principle of infirmity in the sample as well as in the bulk of the commodity, the seller is not answerable. The only warranty is, that the whole quantity answers the sample." But the buyer should remember that the mere exhibition of a specimen of the goods at the time of sale will not of itself constitute a sale by sample, and where there is opportunity for examining the bulk, it is a strong circumstance against so considering it. He should therefore always inquire of the seller whether he offers the specimen as a sample; and further, as we have stated before, if the sale be made by sample, and the contract be reduced to writing, he should see that the memorandum refers to the sample, or otherwise he will not be entitled to the privileges of a sale by sample.

III. FRAUDULENT MISREPRESENTATION.

The third and last exception to the rule of *caveat emptor*, or that the purchaser buys at his own risk, is where the seller has been guilty of fraudulent

misrepresentation and concealment. There is no principle in law more firmly settled than that fraud vitiates a sale, or rather renders it voidable at the option of the party defrauded. In all cases of fraud the purchaser has his choice of remedies: he may either return the goods and rescind the sale; or he may retain the goods and recover damages for the deception. But it is not every false representation made at the time of sale, nor every concealment, that can be considered fraudulent. To constitute a fraud there must be a misrepresentation in respect to a fact, affording a material inducement to a sale, by which the buyer is deceived to his injury, or the concealment or suppression of a material fact, which the seller is bound in good faith to disclose, and in respect to which he cannot innocently remain silent. We will, however, look into this matter further when we become the seller. At present we need only consider the proper course for purchasers to pursue when they know or suspect fraud.

1. *When you discover that fraud has been practiced, and you do not intend to stand to the bargain, exercise your right of rejection immediately after discovery of the fraud.* Do not deal with the property as your own. It is always optional with a party defrauded to rescind the contract altogether, or to waive his right to relief by continuing to deal with the property as his own, with full knowledge of the facts. It matters not what time may have elapsed after consummation of the bargain before the buyer discovers the fraud; but after discovery he must exercise his right of rescission within a reasonable time,

or the law will presume that he intends to assent to the bargain notwithstanding the fraud.

2. Where a misrepresentation has been practiced that you believe would amount to a fraud in law, and you are not satisfied with the bargain, *make an offer to the seller to rescind the contract; but if he refuse, be certain that you can prove fraud* before you resort to an action. Fraud must be proved and will not be presumed. Circumstances, doubtful, though suspicious, will not be sufficient to establish a case of fraud. Remember that it is not every misrepresentation, on the part of a seller, that amounts to a fraud. False assertions, as to the value or quality of goods, are usually (except in cases of especial trust and confidence) treated as opinions on which the buyer has no right to place reliance. Puffing and extravagant commendations of articles are among the seller's privileges, though they often prove the buyer's folly. To amount to a fraud there must be a misrepresentation on which the buyer has a right to rely, or the concealment of a fact material for him to know, and by which he is misled to his injury. If the fact were trifling or unimportant, or if he knew at the time of sale that it was false, or if he were not misled by it to his injury, the misrepresentation or concealment will not establish a case of fraud. "Fraud without damage, or damage without fraud, gives no cause of action; but where these two do concur and meet together, then an action lieth."

Another exception to the maxim of *caveat emptor* might be made by considering those cases in which relief can be had where the purchaser buys under a

MISTAKE OF FACTS; but the rule is subject to many qualifications, and the law will never interfere where so much time has elapsed as to render it impossible to reinstate the parties in their original position or rights. Where, however, an injurious mistake is discovered within a reasonable time in respect to the *nature* of the subject matter of the sale—as where an article was bought as “waste silk,” which could not fairly be sold by that name; or in respect to the *quantity*, as when in a sale of a quantity or set, the buyer supposes he is buying the whole, and the seller supposes he is selling a part only; or in respect to the *price*, when the buyer supposes it be smaller than the seller intends—in these cases the sale may be annulled, or equitable relief can be had. But the mistake must be in respect to a fact which would have affected the terms of the agreement, not trifling or immaterial, or it will not furnish sufficient reason for annulling the agreement.

We will now dismiss the great and much abused rule of the Common Law, *caveat emptor*, and the exceptions to it, and proceed to note the prominent points with regard to the acceptance and rejection of *offers*—the proper course to be pursued in the event of a mistake in executing orders, and the final duties of the buyer.

1. Remember that where by the terms of an offer, it is incumbent on you to express dissent, or wherever your acts afford presumption of assent, your acceptance will be implied.

2. When a verbal offer or proposal of sale is made, without any agreement in respect to the time in which it must be accepted, it should be accepted on

the spot, or the person making the offer will not ordinarily be bound. Yet if the circumstances of the case, or the custom of trade, or the conduct of the parties indicate that a reasonable time is to be allowed, during which the proposal may be accepted, an assent given within a reasonable time will complete the contract unless previously retracted.

3. If you have taken an article on trial for a time, and intend to return it, do so before the time allotted has elapsed; and where no time has been fixed, within a reasonable time, or the bargain will become complete, and you will be liable for the price of the article.

4. When an offer which you deem advantageous and intend to accept, is made to you by letter, *do not delay in mailing the letter of acceptance*, for the seller has the privilege of retracting or modifying his offer at any time before you deposit the letter of acceptance in the post-office. The contract is closed as soon as the letter, properly addressed, accepting the offer, is deposited in the post-office, though it may never reach its destination, unless an intimation of retraction has been previously received. But if you make an offer by letter, and subsequently write a letter, retracting your previous offer, before the party mails his letter of acceptance, it has been held that you will be bound to indemnify him for any loss, expense, or damage he may have sustained by relying upon the contract, as if completed. This is in accordance with the rule that where one of two innocent persons must suffer, he who caused the injury should bear the loss. In making an offer by letter it is advisable

to state that you will not consider yourself bound, if notice of acceptance is not received at or before a certain time named.

If you order goods, and they are forwarded before your letter of retraction is written, you are bound for the price; and if they are destroyed you must bear the loss. And if they are forwarded after the retraction is written, but before it is received, you are bound either to adhere to your original proposition or indemnify the party for his loss or trouble. If you die or become insane, and the person of whom they were ordered, being ignorant of the fact, forward the goods, your representatives must pay.

5. If a proposal of sale be clogged with conditions or limitations, your acceptance must correspond with it exactly, or it will not be binding. An acceptance which varies the terms of an offer is simply a new proposition. Thus, in an action for the non-delivery of barley, where it was proved that the defendants wrote to the plaintiffs, offering them a certain quantity of "good" barley upon certain terms, to which the plaintiffs answered, after quoting the defendants' letter, as follows: "of which offer we accept, expecting you will give us *fine* barley and full weight." The defendants in reply stated that their letter contained no such expression as *fine* barley, and declined to ship the same. The jury having found that there was a distinction in the trade between "good" and "fine" barley: the court held that there was not a sufficient acceptance.

6. If goods have been sent you of a different quality or quantity from that ordered, you are not bound to accept them; or if you ordered a certain number,

or measure, or quantity, you are not bound to take them or any part of them, unless all are furnished on the terms agreed upon ; but if you accept a part you will be prohibited from saying that the contract was entire, and you must accept and pay for as many as are individually furnished according to the contract.

Where ambiguity of expression in an order is the cause of misapprehension and mistake, the loss must be borne by the person who gave the order.

7. When goods not corresponding to your order have been sent by mistake, and you see proper to keep them, you should give notice to the person who sent them that they do not correspond with the order, and then you will only be liable for their actual worth. But if you determine not to keep them, it is your duty to notify the consignor of the fact, and that you await his orders. If special orders be forwarded, they must be strictly observed ; if no orders be sent, you may proceed to sell the goods at public auction, and charge warehouse rent, expenses, &c. If the goods are perishable you must sell them immediately, and then give notice that you hold the proceeds subject to his order.

Lastly, it is the duty of the buyer to pay the price agreed upon ; and in the absence of any agreement as to delivery, to accept the goods at the place of sale and take them away. If no price has been fixed upon, the law presumes that the market value of the goods at the time they were sold was the price intended. If the goods are to be paid for by bill or note, it is your duty as buyer to tender one before

you are entitled to possession ; and if by an *approved bill or note*, you must tender one to which no reasonable objection can be made. In rare instances, buyers have obtained possession of goods before tendering a note upon a promise to call subsequently and settle, and then refused to do so, but courts have decided that no property passes by such delivery, and that the seller may recover possession.

Where goods have perished, provided the seller has performed his part of the contract, it is the duty of the buyer to pay the price agreed upon, together with all the reasonable expenses incurred in keeping them until delivery.

CHAPTER VII.

SELLING GOODS.

POINTS WHICH THE LAW REQUIRES SELLERS TO OBSERVE.

“MEN buy to sell, and sell to buy again.” This is the circular, ever-revolving, never-ending movement that constitutes trade. The trader, whose duties and responsibilities as a buyer we have just considered, as soon as his purchases are in store, is anxious to dispose of them. The stock that he selected with so much care, becomes each successive day less pleasing to his fancy; and as we presume he is desirous of making *bona fide* sales without danger of having them annulled by legal interference, or of involving himself in unforeseen difficulties, we shall seek the points that the law requires him to observe in order to attain this end.

In the first place, the law requires a Seller to observe, that the party proposing to purchase is *legally capable of binding himself by a contract*. As a general principle, the law presumes that all persons are capable of making contracts, but nevertheless it will relieve certain persons, or persons in a certain condition, from all responsibility for their agreements, on the ground of being incapable to give a legal assent. Of this class are *idiots, lunatics, and persons grossly intoxicated*, and consequently sales made to them,

unless decidedly for their benefit, may be annulled. What an *idiot* is, has never been defined with certainty in the law. It has been decided that a person who is capable of learning the alphabet is not an idiot. But the question usually submitted for a jury's decision in cases involving this point, is: Was the person of sound mind or not, and capable of understanding the transaction? If not, the sale is void. Mere weakness of mind, however, unless the deficiency be so great as to give an undue advantage to the other side, does not constitute such a deficiency of intellect, as to prohibit the party from contracting. A *lunatic* is a person whose faculties are deranged, and whose mind is incapable of sequence of thought or argument. If his lunacy be continuous and unbroken, he cannot at any time make a contract either for himself or in behalf of another; but if it be merely occasional, leaving his mind sane at intervals, he may make a binding contract during such intervals. If his lunacy be merely upon a particular point, or subject, or class of subjects, his incompetency to contract is limited to such matters as relate to the particular monomania or hallucination.

A contract made with a person so *intoxicated* at the time as to be incapable of understanding the transaction or exercising his judgment, may be avoided by him on the proof of this fact, no matter in what way the drunkenness may have been occasioned. It will be presumed that he could have given no consent. But if there were not that degree of intoxication, he can have no relief unless there was some contrivance to draw him into drink,

or some unfair advantage taken of his condition to obtain an unreasonable bargain from him.

Slaves are also incompetent to make any purchase or sale, except of themselves. The only contract made by them, which the law recognizes as valid, is a contract with their masters for their emancipation.

II. The law requires the exercise of *caution in making contracts with infants, and with women who are married.*

An infant, as the law affectionately calls every one who has not attained the age of 21, cannot, as a general rule, make a contract which he may not disaffirm during minority, or within a reasonable time afterward. If you sell him goods on credit, and he resell them, and then refuse to pay, you are without legal remedy. If you buy a horse of him, paying the price, and he refuse to deliver, your money is gone. He is not liable on his promissory note, nor bond, nor for borrowed money. If he undertake to do a certain act, and receive money in advance therefor, he cannot be compelled to perform his promise after he has parted with the consideration; nor can the money be recovered from him, for it was the folly of the party to trust him. If, however, he *retain the specific and identical consideration, and it can be identified*, he becomes the trustee of the other party, and as soon as he disaffirms his contract, or refuses to perform it, he is bound to surrender it. So, if an infant has advanced money which has been parted with by the other party, and afterward disaffirms the contract, he cannot, if he have received any benefit therefrom, recover from the other party the advanced consideration. Thus,

if he buy a large quantity of grain, and after reselling a portion disaffirm his contract, he cannot, by returning the remainder, acquire a right to sue the seller for a proportional part of the price. An infant is not bound by his executed contracts if it be in the power of the other party to replace him in the same condition in respect to the matter as that in which he was before the contract; but in such cases he must return the consideration which was advanced to him.

The general rule, denying the obligatory power of an infant's contracts, admits of one exception. He can make binding contracts for meat, drink, clothing, physic, and such other necessities as may be suitable to his actual condition; but even in these cases some care is required on the part of the seller. He is bound to ascertain that the articles which the minor proposes to purchase are actually necessities, and that the latter is not already provided with them by his parents or friends. An infant who lives with his parents, or guardian, or other person under whose care he has been placed by them, and is properly maintained, cannot bind himself to a stranger even for necessities. "No man," says Mr. Justice Gould, "shall take upon himself to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom." If a tradesman furnish articles which might be necessary if the infant were not already supplied by his parents, or if confiding in false appearances, he furnish articles too expensive or numerous for the infant's real condition, he is not entitled to recover pay for them. Goods furnished to an infant trader

are not necessities, although he gain his living by trade.

Infancy is no plea to actions founded in misrepresentation or fraud. If an infant falsely represent himself of age, and on the faith of this another sell him goods, the seller may retake the goods or sue him in damages.

A person may bind himself by a contract made the day previous to his 21st birth-day; and it has been held that "if one be born on the first day of February, at eleven at night, and on the last day of January, in the 21st year of his age, at 1 o'clock in the morning he make a will of land, it is a good will, for he was then of age." It is also settled that an express promise, after he comes of age, to pay back money borrowed, or for goods purchased during his minority, will bind him; but such promise must be given voluntarily, and with a full knowledge that he then stood discharged by law.

A *married woman*, except under peculiar circumstances, as where the husband has been unheard of for seven years, or has deserted her, and left the country without intention of returning, cannot make a contract that will be personally binding on her, and hence the more important question is, in what cases are husbands liable for their wives' contracts? As a general rule a husband is only liable upon those contracts of his wife, which he has either expressly or impliedly authorized or assented to. If you make a contract with a married woman and desire to charge the husband, you must be able to prove that she was acting under his authority. A husband is liable for actual necessities supplied by order of the

wife; but the tradesman must show that they were actual necessities suitable to her rank and condition, and that she was not already sufficiently supplied with them. A husband is liable where the wife has been in the habit of purchasing similar articles from you, whether they be necessities or not, and the bill has been paid by the husband, unless he has given notice that the wife has no authority from him to buy; but if you have given credit on your books exclusively to the wife, or have taken a promissory note from her for the amount, the husband is not liable. He is not liable even for necessities after separation caused by the adultery of the wife, in whatever manner such separation may have been effected, whether by a decree of divorce, or a voluntary elopement of the wife, or her forcible expulsion by the husband; nor after separation by mutual consent if he give the wife an allowance adequate to her maintenance, although there be no written agreement between them. So the elopement of a wife without a sufficient cause, although it be not in an adulterous manner, absolves the husband from all liability on her account; but in this case he is bound to receive her again on her solicitation to return; and if he refuse, he is liable for necessities furnished to her. A man who holds a woman out to the world as his wife, and allows her to use his name, is liable for her engagements, although the creditor knew that the parties were not married. But a man is not liable for necessities supplied to a woman on the ground that he had formerly lived with her, and represented her to be his wife.

A married woman's disability to make contracts binding upon her is not affected by the *married woman's act*; but in cases where the husband being liable for her contracts has not sufficient property to answer the charge, her's may be reached by legal process.

III. Now assuming that the party to whom you are about to sell is competent to bind himself by a contract, we pass on to consider the obligations which the law imposes on a seller in making the bargain, and after it has been completed. The two great dangers which lie in the path of a seller who is desirous of avoiding lawsuits, are constructive fraud, and constructive or implied warranties. In all contracts of sale where the contrary is not expressly stipulated, the law *implies* a warranty that the seller has a title to the goods, if *in his possession*, which he sells, and he is answerable to the purchaser if the title prove defective. By the act of selling he is always understood to affirm that the property he sells is his own, free and clear, whether he does or does not make any distinct affirmation of title, or whether he knows of any defect in his title or not. But where the property sold is not in his possession, and he makes no assertion of title, the prevailing rule of law seems to be that the purchaser buys at his peril.

Fraud, it is well known, vitiates all contracts. But what amounts to fraud is not so clear, and will depend a good deal upon circumstances. Some law writers have defined fraud to be "every kind of artifice employed by one person for the purpose of deceiving another," but the courts have invariably re-

fused to define its metes and bounds, so that its presence in each case as it arises, may be judged of according to the peculiar circumstances of that case. The proof of fraud being the point mainly relied upon by purchasers who are dissatisfied with their bargains, it is always a matter of importance to sellers to guard against its existence, either as a fact or as a legal inference. To this end we advise,

First, *To state your opinions respecting the subject of the contract as matters of opinion or belief, and not as facts.* The difference between a false statement in matter of fact, and a like misstatement in matter of opinion, was adverted to in the preceding chapter on buying goods. It is well settled that any misrepresentation by one party, of a material fact on which the other party had a right to rely, and was deceived to his injury, is a fraud; and it matters not whether the party misrepresenting did not know it to be false, or even believed it to be true, provided he positively stated it, and the other party having a right to rely upon it was misled to his injury. "We take it to be a well-settled rule," says C. J. Shaw, "that in the case of a false and fraudulent representation by a vendor in matters of fact within his knowledge, or which he affirms to be within his own knowledge, not as to matters of opinion, judgment, probability or expectation, in a matter essentially affecting the interests of the other party, a matter in which he reposes confidence in such affirmations, and is in fact deceived by it, the party thus deceived may repudiate and rescind the contract at his election." Hence, where a party falsely represented that a steam engine was of twenty horse power—

that it was in good order and so certified to by engineers; that it was fit for mining purposes, free from rust, and that it had been standing for two or three years. Each misrepresentation was of a material fact, and the contract was set aside for fraud. But an expression of opinion or judgment by the seller as to the qualities or value of an article, even if false, does not amount to a fraud or to a warranty. Every person reposes at his peril in the opinions of others, when he has an equal opportunity to form or exercise his own judgment. Puffing or strong commendation of articles is therefore allowable, and does not amount to a fraud that will avoid a contract. False statements in respect to the motives and inducements to a sale will not invalidate a contract, and it is the buyer's indiscretion to rely upon them. It will also be the seller's indiscretion if he suffer statements, however false, as to the motives of the purchase, to influence the price. Thus, in a case where a purchaser stated that his partners would not give more than \$4000 for the seller's interest in a concern, whereby the latter was induced to take that sum, and though he was afterward able to prove that they would have given \$8000, it was held he was not entitled to relief. To entitle either party to relief on the ground of fraud, there must be a false representation of something material stated positively and unequivocally *during the negotiation*, and not an assertion as a matter of opinion, which does not imply knowledge, and respecting which men may differ. It is always a question for the jury to determine, whether a representation be part of the contract, or merely an expression of opinion.

Secondly, *To avoid all tricks or artifices calculated to mislead.* It seems to be a well-settled rule in law, that a buyer is at liberty to *cheat himself* as much as he pleases, but the seller must not in the slightest degree assist him to cheat himself. Where the circumstances are suspicious, courts look narrowly into the actions of the seller, and the slightest false representations, or attempts to withdraw the attention of the buyer, or even the darkening of a window in some cases, has been construed to be fraud. In the celebrated barley-corn case, tried more than a hundred years ago, where a man sold a horse for a barley-corn for the first nail in his shoe, doubling it for every other nail, there being thirty-two, which amounted to 500 quarters of barley—the judge set aside the contract, and directed the jury to give the plaintiff the value of the horse as damages.

Thirdly, *Do not suppress material facts respecting the thing sold, nor conceal latent defects known to you.* “If there be an intentional concealment or suppression of material facts,” says Kent, “in the making of a contract, in cases in which both parties have not equal access to the means of information, it will be deemed unfair dealing, and will vitiate and avoid the contract. As a general rule, each party is bound to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open, or naked, or equally within the reach of his observation. In the sale of a ship which had a latent defect known to the seller, and which the buyer could not by any attention possibly discover, the seller was held to be bound to disclose it, and the concealment was justly

considered a breach of honesty and good faith. So, if one party suffers the other to buy an article under a delusion created by his own conduct, it will be deemed fraudulent and fatal to the contract; as if the seller produces an impression upon the mind of the buyer by his acts that he is purchasing a picture belonging to a person of great skill in painting, and which the seller knows not to be the fact, and yet suffers the impression to remain, though he knows it materially enhances the value of the picture in the mind of the buyer. One party must not practice any artifice to conceal defects, or make any representations for the purpose of throwing the buyer off his guard."

But not every concealment of facts material to the interests of a party will be considered a fraud. It must amount to a suppression of facts which one party under the circumstances was bound in conscience and duty to disclose to the other, and in respect to which he could not innocently be silent. There is usually a distinction made between circumstances that are extrinsic, and those which are intrinsic and form material ingredients of the contract. Thus, I am not bound to disclose my knowledge of the state of the markets—of the rate of duties—of the occurrence of peace or war; whilst silence respecting latent defects, natural or artificial in the article itself, and *known to me*, would be a fraud.*

* What remedy, if any, a seller has, if a man knowing his own insolvency and utter incapacity to make payment, buys goods of him who is ignorant of his insolvency, and sells them under the belief of his solvency and good faith, seems to be a matter not well settled. Wm. Story in his treatise on sales says "if a man know-

IV. *When the terms of a negotiation have been determined upon, reduce the contract to writing, and be*

ing that he is insolvent and incapable of making payment, purchases goods of another, who is ignorant of any change in his circumstances, and sells them under the most implicit belief in the good faith and solvency of the buyer, the concealment of his insolvency would be a direct fraud on the seller, for which he could recover, and he cites in support thereof *Conyers v. Ellis*, 2 Mason, 239. Kent in his Commentaries, vol. 2, p. 497, n., says, "A purchase of goods with a preconceived design not to pay for them is a fraud, and will avoid the sale. No title passes to the vendee." (*Bristol v. Wilsmore*, 4 B. and C., 514; 13 Wendell, 570, *et al.*) But in the case of *Cross v. Peters*, 1 Green. R., 376 it was decided that "the mere insolvency of the vendee, and the liability of the goods to immediate attachment by his creditors, though well known to himself and not disclosed to the vendor, would not of itself avoid the sale;" and in the case of *Smith v. Smith*, decided by the Supreme Court of Pennsylvania, and reported in *Livingston's Monthly Law Magazine*, for Jan., 1854, it was held that a sale will not be set aside as fraudulent simply because the buyer was at the time unable to make the payment agreed upon, and knew his inability, and did not intend to pay. J. Lowrie says, "An intention not to pay is dishonest, but it is not fraudulent. (9 Watts. 34; 6 Wend. 81.) The law provides an action on the contract as the remedy for just such dishonesty. And it is no more fraudulent to have such an intention at the time of purchase than at the time when payment ought to be made. Such intention by itself is disregarded by the law, for it can be set aside by the usual contract remedies.

"Nor does insolvency make a sale voidable after delivery. (6 Wend. 81; 2 Mason, 240.) If such were the law, there is no calculating the suspicions and disputes it would nourish. If it were so, the law of *stoppage in transitu* would be effectually abolished by one of a much more sweeping character. Nor does insolvency combined with an intention not to pay, for it is no more fraudulent in an insolvent than in a perfectly solvent man to have such an intention. The buyer's knowledge of his insolvency would be quite as dangerous a test of fraud, for it might

careful that it embraces the names of the seller and the buyer, the commodity and the price, the time of credit, if any, and the conditions of the delivery.

The policy of reducing all contracts to writing is too obvious to be insisted upon ; but aside from this, the great majority of the States of this Union have re-enacted the celebrated statute of Charles II., known as the Statute of Frauds, in which there are two provisions rendering a memorandum in writing, in certain cases, absolutely essential to the validity of a contract. The fourth section of the English Statute of Frauds declares, among other things, that no action shall be brought to charge any person upon any agreement *not to be performed within one year from the making thereof, unless there be some memorandum in writing, of the agreement signed by the party to be charged.* Plain as the provisions of the Statute of Frauds apparently are, it has been said, that a million of dollars have been expended in explaining them, and the above provision, with the others, has

always be inferred from the fact of insolvency, and from the presumption that every man is acquainted with his own affairs."

"As to the fact of not revealing his insolvency, it is completely set aside by the principle, that no man is under a legal obligation to make known his circumstances when he is buying goods, and no wise dealer would rely upon his representations if he did."

"The right of a reclamation after delivery exists only where an action of deceit would lie. As a man cheated out of his money may sue in *assumpsit* or *deceit*, so one cheated out of his personal chattels may sue in *trover*, *replevin*, or *deceit*. The injury and the remedy correspond in substance. But there must have been actual artifice intended and fitted to deceive, before a man can claim he had been defrauded."

largely engrossed the attention of courts. In the majority of our States it is held that this memorandum must set forth, not only the promise, but the fact; that it is founded upon a valuable consideration, and that the statute only applies to agreements which, by express stipulation, are not to be performed within a year. If the performance depend upon a contingency, which may take place within a year, a verbal agreement is sufficient; but if it is expected that the agreement will be but partially performed within a year, the statute applies. It excepts only those agreements that are to be, or may be performed within a year. Thus, in a case where Mr. Boydell, a London publisher, proposed to publish a series of parts from Shakspeare's plays, in numbers, at the price of three guineas a number, two guineas to be paid at the time of subscribing, and the remaining guinea on the delivery of each number, and agreed that one number at least should be published annually; it was held that to bind a subscriber an agreement must be in writing, and signed by him. It was further held in this case, that the subscriber's signature in a book entitled "Shakspeare's Subscribers—their signatures," not referring to a printed prospectus which contained the terms of the contract, was not sufficient to take the case out of the statute, as the connection could only be established by parol evidence.

The seventeenth section of the English statute enacts "that no contract for the sale of any goods, wares, and merchandise, for the price of £10 sterling or upward, shall be allowed to be good except the buyer actually receive the same, or give some-

thing in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereto lawfully authorized." This provision has been adopted generally by the different States of the Union; but the amount necessary to bring a contract within the statute, differs in many of them. In Massachusetts and New York, it is \$50; in Vermont, \$40; in Connecticut, \$35; in New Hampshire, \$33.33; and in New Jersey, \$30. Since its enactment there has been an immense deal of litigation, in which the questions as to what constitutes a sufficient delivery, or acceptance, or earnest, or memorandum in writing, under the statute, have been considered; but the later authorities have been disposed to construe this provision liberally, and have decided that a delivery of a bill of parcels to the purchaser, with his name written thereon and accepted by him, is a sufficient memorandum in writing within the statute. It has also been decided that the statute applies only to such goods as have a "present existence in the shape in which they are to be delivered at the time of making the bargain;" hence, contracts for the sale of growing crops, or of fruit when it has ripened, or of goods to be manufactured, are not considered within the statute.

In preparing a bill of parcels where you do not intend to warrant, it may be to your interest, as seller, to avoid the use of more words, descriptive of quality or excellence, than are absolutely necessary to identify the transaction.

V. *As soon as possible after the negotiation has been completed, separate the goods sold from the bulk, and fit them for delivery.*

It is a well settled doctrine in the law of sales, that if any thing remain to be done as between the seller and the buyer, in order to distinguish goods sold from the general bulk, they are at the seller's risk; but when every thing has been done by the seller to put the goods in a deliverable state, the property, and consequently the risk of them, passes to the buyer. If a portion only of the goods have been separated from the stock or quantity, and an accident happens, the risk of the buyer is limited to the portion so separated or ascertained. Thus, in a case where turpentine in casks having been sold at auction, at so much per cwt., the casks to be taken at a certain marked quantity, except the last two, out of which the seller was to fill up the rest before they were delivered to the purchasers, on which account the last two casks were to be sold as uncertain quantities; and a portion of the casks having been filled up from the last two, when a fire consumed the whole; *it was held* that the property passed to the buyers in all the casks that were filled up, because nothing further remained to be done to them by the seller; but the property in the casks not filled up, remained in the sellers, at whose risk they continued.

In the absence of any express agreement, it is the duty of the seller to weigh, measure, or number the goods *at his own expense*, for the law will not imply that the buyer shall pay for any services rendered in relation to the property *previous* to the comple-

tion of the sale by delivery. In a case where the plaintiffs having sold to the defendant the wool lying unsacked in three rooms, the quantity to be ascertained by weighing, but without any *express* contract as to who should be at the expense of sacking; and the plaintiffs sacked the wool in sacks furnished by the defendants, and then weighed and shipped it: *it was held*, that as the sacking preceded the delivery of the wool, the law would not imply a contract on the part of the defendants to pay the plaintiffs for sacking.

VI. *When goods have been set aside to be sent for by the purchaser, or to be sent to him, then is the time to make the entry in your books of a charge against him, and such entry will be evidence.*

VII. *Perform all conditions or stipulations introduced into a contract of sale, and binding upon you as seller, or the purchaser will not be bound by the contract.*

Conditions inserted in contracts of sale, are usually conditions precedent, and stipulations as to precise facts to be done are generally equivalent to conditions. If I sell goods "to be delivered on or before" a certain day, and fail to deliver them within the time mentioned, the purchaser is not bound to take them. The fact that it was impossible for the seller to deliver, has been held no defense to an action for non-delivery, as where the defendants having engaged, without reservation, to ship to the plaintiff certain quantities of hemp, on or before a day mentioned, and the Russian government confiscated the hemp as British property, the court held they were, nevertheless, liable for the non-performance of their contract. Again, if I sell goods, stipu-

lating to mention to the buyer the name of the ship in which they will be shipped *as soon as I know it*, and neglect to comply with this stipulation in strict terms, the purchaser need not take the goods. A neglect of eight days after knowledge under this stipulation, was held fatal to the contract.

In construing conditions in a contract of sale, courts endeavor to carry into effect the intentions of the parties. Where a party sold "32 tons, more or less, of Riga Rhine hemp, on arrival per Fanny and Almira," it was held, that this meant, on the arrival of the *goods*—and on the ship arriving without the goods, the contract was at an end. Where goods are sold with the privilege of return in a certain time, if not damaged, and the purchaser neglect to return them within the time, or if they be damaged, he must pay for them. Where goods are sold with the privilege of return, but no time is mentioned, the contract will be held to mean a *reasonable time*; and what is a reasonable time is a question of law for the court to determine, in view of all the circumstances of each particular case.

Where a sale is made on a credit of six or nine months, the purchaser cannot be sued for the price until nine months have elapsed.*

* "So, where goods were sold at six months' credit, payment to be made by a bill at two or three months, at the vendor's option—it is in effect a credit for nine months. And even though the vendee be guilty of such fraud as would have entitled the vendor to reclaim the goods, he cannot maintain an action for the price until the time of credit has expired."—*Long on Sales*, p. 190.

VIII. *Deliver the goods sold, at the time, and in the mode agreed upon, and at the place designated.*

Until the time of delivery the seller is bound to keep goods sold with ordinary care, and is liable for their loss through his gross or wanton negligence. If no place of delivery was agreed upon, the place where they were at the time of sale will be deemed the place of delivery. When the goods are bulky, a delivery of a part for the whole, or the delivery of the key of the warehouse in which they are locked up, or the receipt of warehouse rent for the thing sold, which by the desire of the buyer remains with the seller, or the marking of goods by the direction of the buyer, or the delivery of a written order directing the person in whose care the goods are, to deliver them to the buyer, has been held sufficient evidence of delivery to entitle the seller to an action for goods sold and delivered, and to enable the purchaser to maintain an action of trespass against a subsequent purchaser who got possession of them.

If the parties are distant from each other, the seller must follow the directions of the buyer with regard to the way of sending the goods sold to him, and if he disregard such orders, he is responsible for their loss in transportation. If no directions be given, or if they be general, without naming any particular mode, an observance of the usual precautions will protect the seller. On delivering goods to a carrier the seller must exercise due care and diligence, so as to provide the consignee with a remedy over against the carrier; and if they be sent by ship or otherwise, it is a part of his duty to notify

the buyer of this fact, so that he may insure or take other precautions. If the usage between the parties has been for the seller to insure, or if he has received specific instructions to insure in any particular case, and he neglects to do so, he is liable for a loss occasioned by this negligence.

IX. *Do not part with the possession of the goods sold, if you wish to maintain a lien upon them until payment.*

When goods have been made ready for delivery, the seller has still the right of possession until the buyer performs the conditions precedent, which in a sale for cash is the payment of the price. If he neglect or refuse to pay for them within a reasonable time, the seller may treat the sale as void, and resell the goods, or he may resell the goods at auction and hold the buyer responsible for any deficit in the price. If, however, credit was agreed to be given, the seller must surrender possession upon request, or on refusal the buyer may take them by *trover*, unless in the meantime he has become insolvent, when the seller may demand security and refuse to deliver without it. Where payment is expected on delivery, and the buyer on getting the goods omits, or evades, or refuses to pay for them, or when he obtains them upon false pretences under color of purchasing them, the seller has a right instantly to reclaim the goods.

X. After parting with the possession of goods without payment received, you learn that the purchaser is insolvent, *stop the goods before they come into his possession*. A right to stop goods, which is called the right of *stoppage in transitu*, the law gives to the seller to protect him in case of the buyer's insol-

vency. It is a right which is superior to all claims of the creditors of the purchaser, and cannot be superseded by their attachment or levy on the goods before the transitus is at an end. It is a right which nothing can defeat except payment of the whole price; or delivery of the goods to the purchaser; or a *bona fide* sale or mortgage of the goods for a valuable consideration, accompanied with a transfer of the bill of lading.

Payment of the whole price will of course divest the seller of the right of stoppage, but it is well settled that payment in part, or the taking of a bill of exchange or promissory note for the price, though indorsed over by the seller to a third person, will not divest him of this right.

What constitutes a sufficient delivery of goods to take away this right has given rise to questions of great nicety and difficulty. "In many of the cases," says Kent, "where the vendor's right of stopping *in transitu* has been defeated, the delivery was constructive only; and there has been much subtlety and refinement on the question, as to the facts and circumstances which would amount to a delivery sufficient to take away the right. The point of inquiry is, whether the property is to be considered as still in its transit; for if it has once fairly arrived at its destination so as to give the vendee actual exercise of dominion or ownership over it, the right is gone. The cases in general on the subject of constructive delivery may be reconciled by the distinction that if the delivery to a carrier or agent of the vendee be *for the purpose of conveyance to the vendee*, the right of stoppage continues, notwithstanding such a con-

structive delivery to the vendee ; but if the goods be delivered to the carrier or agent *for safe custody or for disposal on the part of the vendee*, and the middleman is by agreement converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage." It has been decided that a delivery of a key of the seller's warehouse to the purchaser ; or paying the seller rent for goods left in his warehouse ; or lodging an order from the seller for delivery with the keeper of the warehouse ; or delivering a bill of parcels to the buyer, with an order on the storekeeper for the delivery of the goods ; or demanding and marking the goods by the agent of the buyer at the inn where they had arrived, at the end of the journey ; or suffering the goods to be marked and resold and marked again by the under purchaser, are all acts of delivery sufficient to take away the seller's right of stoppage *in transitu*. But if the delivery be not complete, and some other act remains to be done by the consignor, the right of stoppage is not gone ; and if the goods are lodged in a public warehouse for default of duties, though arrived at the port of delivery, they are not deemed to have come into possession of the buyer so as to deprive the consignor of his right.

It is now also well settled, though no principle in mercantile law has been more elaborately discussed and controverted, that the seller's right of stoppage upon the occurrence of insolvency in the buyer, may be defeated by a *bona fide* sale or mortgage of the goods for a valuable consideration, accompanied with a transfer of the bill of lading ; and the validity of the assignment is not confined to those cases in

which the assignee has no notice that the goods have not been absolutely paid for in money. "If the assignee takes an assignment *bona fide*," says Justice Wheeler, "without notice of any such circumstances as would render a bill of lading not fairly and honestly assignable, he acquires a good title against the assignor. Goods are seldom actually paid for in money at the time of their shipment; in general a bill of exchange is drawn for the price. If a person knowing that such is the transaction, and that the bill of exchange has been accepted, takes an assignment of the bill of lading fairly and honestly, for a valuable consideration, before the money becomes payable, without any reason to know or apprehend that the consignee is likely to fail, and not to pay the money in due time—the consignor cannot prevent the delivery of the goods."

The validity of the right of stoppage depends entirely on the bankruptcy or insolvency of the buyer; and it appears to be considered that the term insolvency, when used with reference to this right, means a general inability to pay, evidenced by stoppage of payments. No particular form is necessary to stop goods *in transitu*; hence it has been stated generally that the seller may take them by any means not criminal. A demand of the goods of the carrier, or a notice to him to stop the goods, or an assertion of the seller's right by an entry of the goods at the Custom House, or a claim and endeavor to get possession, is equivalent to an actual stoppage of the goods.*

* Whether the right of stoppage *in transitu*, when exercised, gives the seller the right to rescind the contract, or whether it is

Lastly—*The law requires from the seller a strict compliance with his express and implied warranties.*

What is a warranty? *Express warranties* have been thus defined: *every affirmation, at the time of sale of personal chattels or goods, is a warranty, provided it appears to have been so intended.* Mere affirmations or representations, whether oral or written, mere expressions of judgment, or opinion, or belief, do not constitute a warranty: it must be an assertion upon which the seller intends *that the buyer shall rely, and upon which he does rely.* It is well settled that no particular form of words is necessary to constitute a warranty. I “promise” that the matter is so, is as well as if the words were: “I will warrant that it is so.” (19 John., 290.) And so if any other words of affirmation are used in such a manner as to show that the party expects or desires the other to rely upon the assertion as a matter of fact, instead of taking it as an expression of judgment or opinion of the seller, it amounts to the same thing. But in cases of express warranty, or a representation amounting thereto, you will only be bound to make it good according to its terms and evident import. If it be limited to particular qualities, or to a certain duration of time, your liability does not extend beyond such qualities or such time. If the warranty be expressed in technical terms, it

merely an *extension of his lien*, seems not to be well settled, but the weight of authorities are in favor of the latter view, and that the seller can only legally sell the goods as any one may sell those on which he has a lien; if they bring more than the debt, he must account for the surplus, and if they bring less, he may demand the balance from the purchaser or his assignees.

is to be interpreted according to their technical meaning, unless they be plainly used in a different sense, and so understood by the buyer. Thus, a warranty that a horse is "sound," will be held to mean that he has not any unsoundness calculated to render him less serviceable permanently; but by custom and usage it does not provide against "roaring,"—unless it can be shown to proceed from some organic defect,—or against slight disorders, or temporary injuries from accident.

Whether words used in a conversation at the time of a sale amount to an express warranty is a question for a jury to determine.

With regard to *implied warranties*, we have referred to them in the preceding chapter as exceptions to the common law rule of *caveat emptor*. The law implies a warranty that a seller has a title to goods in his possession which he offers to sell, unless he expressly stipulates to the contrary—that the article sold is in substance and kind the thing for which it was sold; and if sold by sample, that the bulk shall correspond in kind and quality with the sample. In a case of a failure to fulfill these implied warranties, the law gives the buyer the privilege of returning the goods within a reasonable time, and rescinding the contract; and if the price has been paid, he may recover it back; or he may keep the goods and give notice of the insufficiency, and then he will be liable only for the actual value, and not for the contract price.

It will be thus seen, that the old common law doctrine of *caveat emptor* has been pretty effectually battered down by modern decisions; and that a

seller, in attempting to tread tortuous paths in the hope of greater gains, will now probably find so many traps in his way in the shape of Express and Implied Warranties, Inferential Fraud, &c., that in the end he will become convinced that legally as well as morally "Honesty is the best Policy."

CHAPTER VIII.

SELLING GOODS AND GIVING CREDIT.

FALSE PRETENCES—FALSE REPRESENTATIONS—GUARANTEES.

In the preceding chapter we aimed to state the leading points which the law requires sellers to know and observe in making the ordinary contracts of sale. We now propose to proceed a step further and inquire in what cases a seller may give credit upon faith in the buyer's own representations as to his claims to credit—secondly, upon recommendations and representations of third persons as to his solvency—and lastly, upon the guarantees of third persons.

A buyer's representations of his own honesty or ability to pay, it may be stated as a general rule, are not cognizable by the law, and a seller cannot safely give a credit based on them alone, looking to the law for protection. Where, however, the representations, if false, amount to the misdemeanor of obtaining goods by false pretences, the fear of the penalty may be an efficient aid in collecting a debt that otherwise might be more than doubtful, and therefore, and for other reasons, it is important for traders to know what circumstances constitute this offence.

I. OBTAINING GOODS BY FALSE PRETENCES.

This is not an offence indictable at common law, and consequently, for an accurate comprehension of its exact bounds we must refer to the statute laws of the different States. The provisions, however, of nearly all the American statutes relating to the offence, are similar to those of the English statute, which enacts that "if any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security with intent to cheat or defraud any person of the same—such offender shall be guilty of a misdemeanor," punishable by fine or imprisonment, or both. Though it is evident that, to constitute the offence, two distinct elements must co-exist, viz.: obtaining goods, and secondly, obtaining them by a false pretence; yet the statute does not inform us what a false pretence is. In answer to the query, What is a false pretence? law writers have said that the term *includes every extortion of goods or money with an intent to defraud, and that a false representation authorizes the inference of an intent to defraud*. This definition is sufficiently comprehensive to make every falsehood that has a material influence in inducing another to part with his goods, an indictable offence; but courts, from considerations of public policy and to prevent a general resort to criminal prosecutions as a satisfaction for bad bargains, have refused to give the term so wide a scope. Some judges, however, seem to err on the other side, and through leniency con-

fine the offence within limits too narrow for public protection.*

* In the case of the *People v. Haynes*, 14 Wend., 546, where the defendant had been convicted of the offence for representing to certain merchants of New York, in *answer to their inquiries*—that a note of his had not been protested—that he was worth from \$9000 to \$10,000; that he was not embarrassed, and that he was able to pay all he owed; that he had no indorser, and that he had never indorsed but one note in his lifetime, and that was more than a year before; all, or nearly all of which was false, Senator Tracy, in setting aside the verdict, principally, however, on the ground that the goods had been completely delivered before the representations were made, observed: "I have another strong objection to this conviction, which is founded in the belief that the false representations proved were not, under the circumstances in which they were made, false pretences within the meaning of the statute. They were direct answers to distinct interrogatories put to the defendant, and are, I think, distinguishable from those *artfully contrived* stories, against which only, in my opinion, the statute was designed to guard. To say, as in this case, that an untrue reply to an inquiry made of a person, how much he is worth, or whether he is embarrassed, is what the statute means by a false pretence, is to give to it a sweeping and mischievous construction, which if carried out to all cases it would reach, no court could enforce, no community could tolerate. I admit with Lord Kenyon, 3 T. R., 102, that the offence created by the statute is described in terms extremely general, and that there is difficulty in drawing a distinct line between the cases to which does and does not apply. But this very admission of Lord Kenyon, made many years after the statute was in force, proves what, till very lately, has never been doubted—that a *a bare naked lie unaccompanied with any artful contrivance is not what the statute denominates a false pretence.*" * * * "An authorised definition of it is a 'delusive appearance produced by false representations'—and this comes much nearer to my notion of its statutory meaning than any definition does which confounds it with a naked falsehood."

From a review of the cases, the law seems to be, that whenever a person comes to another, and *voluntarily, not merely in answer to interrogatories, makes false representations, or assumes a character he does not sustain, or represents himself in a situation which he knows he is not in; or represents falsely any occurrence that has not happened, to which representations persons of ordinary caution would give credit, and thereby obtains goods, money, or valuable security, he is guilty of obtaining them by a false pretence.* To convict a person of this offence, it is not necessary to establish that the pretences proved to be false were the sole or only inducement for making the transaction. It is sufficient if they had so material an effect that without their influence upon the mind of the party defrauded, he would not have given the credit or parted with the property.

To illustrate what constitutes the offence referred to, we will state briefly some of the cases, principally English cases, which have been pronounced within the statute. A carrier who had obtained pay for the carriage of goods upon a false representation that he had delivered goods and taken a receipt, which he had lost or mislaid, was held guilty of obtaining goods by a false pretence, and transported for seven years. So, a foreman of a tailoring establishment, who had been entrusted to pay the workmen, and by rendering a false account of the number of workmen employed, obtained extra pay which he appropriated to himself. A person who induced another to sell him goods as for cash, and directed him to send them to his lodgings, where he delivered fabricated bills in payment, retaining the goods, was

convicted of obtaining them by a false pretence. Where money was obtained by the acceptor of a bill of exchange from the drawer for the purpose of paying the bill, under the false pretence that he was prepared with the balance, and afterward used the money so obtained for his own purposes and suffered the bill to be dishonored, he was held guilty within the act. So, if a person obtain goods from another, and give in payment a check upon a bank where he has no cash and keeps no account. "The fact that checks," said Chancellor Walworth in a case of this kind, "are frequently drawn by men of business before they have funds actually in bank to meet them, could not alter the law of the case, as it must always be a question for the consideration of the jury, whether the prisoner intended to commit a fraud by imposing a check upon another which he knew would not be paid." Hence it is evident that a false pretence need not be *in words*. It must, however, be of *some existing fact* by which another is induced to part with his property *and not a mere promise of future conduct*. Thus, a pretence that a party will do an act he does not mean to do, as to pay for goods on delivery, is not a false pretence within the statute. It is also essential that the false representations or pretence be made *before* the actual delivery of goods as an inducement to the sale or delivery, and not after they have been delivered.

Goods obtained by false pretences can be recovered back by the owner while they remain in the possession of the offender; but after they have passed into the hands of third persons, without notice, for a valuable consideration, it is doubtful whether

they can be recovered again under any circumstances.

II. FALSE REPRESENTATIONS AND RECOMMENDATIONS.

Another matter of importance for sellers to understand is *in what cases they may give credit to a party on the representations of third persons, and hold the latter responsible for any loss or damage occasioned by their misrepresentation.* It is to be regretted that the law respecting a subject so important has not been very clearly defined, and we can do but little more than submit to the consideration of persons interested, the substance of a few of the leading decisions respecting it. The first direct authority on this subject is that of *Pasley v. Freeman*, 3 T. R., 51, where it appeared that the plaintiffs had sold to one Falch 16 bags of cochineal, to the value of about \$10,000, on the representation of Freeman, who had formerly been in partnership with Falch, that he was a person safely to be trusted and given credit to, when he well knew the same to be false; *it was decided* that "a false affirmation made by the defendant with an intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action it is not necessary that the defendant should be benefitted by the deceit, or that he should collude with the person who is." Buller, J., in his opinion in this case, makes some remarks which subsequent decisions have sustained, and which are of importance to be known by merchants. He says: "I agree that an action cannot be supported for telling a bare naked lie; but that I define to be, saying a thing which is

false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practiced, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person." Again he says: "Then it is said that the plaintiff had no right to ask the question of the defendant. But I do not agree in that; for the plaintiff had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in defendant's situation is that he shall give no answer, or that if he do, he shall answer according to the truth as far as he knows. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to the jury; for the law protects a man in giving that answer, if he does it in confidence and without malice. No action can be maintained against him for giving such an answer, unless express malice can be proved." "And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbor into a heavy loss, even though it be under the specious pretence of serving his friend, I say *ausis talibus istis non jura subserviunt.*"

In a subsequent case of *Hamar v. Alexander*, 2 B. and P., N. R. 241, where it was proved that the defendant represented one Leo to be a good man, who might be trusted to any amount, and added, "If he does not pay for the goods, I will," whereupon the plaintiff sold him goods on credit; and it was further proved that the defendant knew Leo to be in bad circumstances, and made the representation with a view to obtain credit for him, in order that the goods sold to Leo might be consigned to a house with which the defendant was connected, Lord Mansfield, in his decision said: "I am far from wishing to sustain an action simply upon misrepresentation, but there never was a time in the English law where an action might not have been maintained against the defendant for this gross fraud. The only question then is, whether the addition of the promise that if Leo did not pay the defendant would, will prevent the plaintiff from having a right to support this action. I think it will not. There is no proof that the plaintiff ever considered the defendant as his debtor, or ever called upon him for the money, or relied upon his promise in the least degree. In the next place, we must suppose every man to know the law; and if the plaintiff was acquainted with the law he must have known that the defendant's promise, (not being in writing,) was worth nothing, and could have given no credit to him upon it."

In a Pennsylvania case of *Browne v. Boyd's Ex'rs.* 6 State R., 316, where it appeared that the buyer was a mere tool in the hands of the defendant, who set him up, kept his books, attended him to market, and by false representations as to his solvency and

ability to pay, obtained credit for him, the court remarked—

“The ground of action is the deceit practiced upon the injured party; and this may be either by the positive statement of a falsehood or the suppression of material facts which the inquiring party is entitled to know. The question always is, did the defendant knowingly falsify, or willfully suppress the truth with a view of giving a third party a credit to which he was not entitled. It is not necessary that there should be a collusion between the party falsely recommending and him who is recommended; nor is it essential, in support of the action, that either of them intended to cheat and defraud the trusting party at the time.” “The motives with which he was actuated do not enter into the inquiry. If he make representations productive of loss to another, knowing such representations to be false, he is responsible as for a fraudulent deceit.”

On the other side, the case of *Haycraft v. Creasy*, 2 East, 92, is often referred to as the leading one to prove that without fraud, no language, however strong, will render a man liable in damages for a misrepresentation as to the trustworthiness of another. It was there decided that a representation made by the defendant to an inquiry concerning the credit of another, who was recommended to deal with the plaintiff, that the party might safely be credited, and that he spoke this from his own knowledge and not from hearsay, will not sustain an action on the case for damages, on account of a loss sustained by the default of the party, who turned out to be a person of no credit, if it appear that such repre-

sentation was made in good faith, and with a belief in the truth of it, for the foundation of the action is fraud and deceit in the defendant, and damage to the plaintiff. And further that the assertion of *knowledge* respecting the credit of another meant no more than a strong belief, founded on what appeared to the defendant to be reasonable and certain grounds." *

* The facts in the case of *Haycraft v. Creasy* as set forth, were substantially these:—Creasy, the defendant, who was a currier, came to Haycraft, an ironmonger, and stated that he had recommended a Miss Robertson to come to the plaintiff for such articles as she might want in the way of his business. The plaintiff's son inquired as to her responsibility, she being an entire stranger to him and to his father, to which the defendant answered "Your father may credit her with perfect safety, for *I know of my own knowledge* that she has been left a considerable fortune lately by her mother, and that she is in daily expectation of a much greater at the death of her grandfather, who has been bed-ridden a considerable time." The defendant afterward came with Miss Robertson, and they looked out and ordered articles to a large amount. The plaintiff's son swore that he dealt with them solely on the defendant's information. Afterward a brother of the plaintiff called on Creasy to make some additional inquiries. The defendant then repeated to him the same assertion that Miss Robertson was possessed of great fortune, and greater expectations, and was related to certain persons of rank whom he named, and added, "I can *positively assure you of my own knowledge*, that you may credit Miss Robertson to any amount with perfect safety." The brother replied, "I hope you do not inform me thus *upon bare hearsay*; but do you know the fact yourself?" The defendant answered: "Friend Haycraft, I *know* that your brother may trust Miss Robertson with perfect safety to any amount." It afterward appeared that this Miss Robertson, who had formerly been a teacher in a school, which the defendant knew, as he had sent children to her, had given herself out on a sudden as a person of considerable fortune which she had received from her mother, and

In the case of *Goddard v. Lord, et al.*, 13 How.

after obtaining large sums by the imposition, finally absconded. It was further proved that the defendant had lent her on her own acceptances about \$10,000, without security at the time, but afterward, before the final exposure, had obtained of her a bond and warrant of attorney to secure his advances. The jury found a verdict for the plaintiff for £485; but on application the verdict was set aside for reasons which will appear in the following extracts from the judges' remarks. Grove, J., says: "The only question then is, whether there is such evidence of fraud in this case as will sustain the action? Now I know not where to find any fraud in the transaction between these parties. I consider what was said by the defendant upon the several occasions as no more than asserting his opinion of the credit of Miss Robertson; an opinion which he seems fairly to have entertained. It is true that he asserted his own knowledge upon the subject; but consider what the subject matter was, of which that knowledge was predicated; it was concerning the credit of another, which is a matter of opinion. When he used those words, therefore, it is plain he only meant to convey his strong belief of her credit, founded upon the means he had of forming such an opinion and belief." "Until some case shall be decided which goes further than that of *Pasley v. Freeman*, there must be evidence of fraud to support such an action, and evidence of being a dupe is not sufficient."

Lawrence, J., says: "Stress has been laid on the defendant's assertion of his own knowledge of the matter; but persons in general are in the habit of speaking in this manner without understanding *knowledge* in the strict sense of the word in which a lawyer would use it. This observation will not only apply to ordinary men in common conversation, but also to persons of the best information. If any man should say that he *knows* there is no city larger than London, it must be understood that he is speaking only from information and belief upon such a subject, and not from actual mensuration. The same must be understood when one is speaking of his knowledge of the credit of another."

Le Blanc, J., says: "By *fraud*, I understand an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill-will toward the other is immaterial.

U. S. R., 198, the plaintiff offered, in support of his declaration, the following letter:

"To JOHN GODDARD, Esq., Bangor, Me.

"Sir:

"We, the undersigned, have full confidence in Messrs. E. K. West & A. W. Daby, dealers in coal, lumber, lime, &c. They are men well worthy of credit, and good for what they wish to purchase. The bearer of this, Mr. E. K. West, is visiting your city for the express purpose of purchasing lumber for the New York market.

"Yours, respectfully,

S. B. LORD,

GEORGE W. JENNESS."

On the faith of this letter, Mr. Goddard credited West & Daby for a cargo of lumber, worth nearly \$2000, at four months; and for which lumber West & Daby never paid, having been insolvent when the letter of recommendation was given, and so continued afterward. It appeared that the above letter of recommendation was written upon the faith of a similar one from the son of Lord, then in New York, to his father, and presented to him by West, Lord & Jenness having no personal knowledge of the parties whom they had recommended. The court below charged the jury, that if a party make representations as to the credit of an individual, ig-

Then the question here is whether the defendant's saying that which, critically and accurately speaking, was not true, but not having said it with any intention to deceive, brings the case within the doctrine of *Pasley v. Freeman*? I think not."

norantly and without personal knowledge, and without full and proper inquiries, and the statements turn out to be false, the jury may infer that those so recommending did wrong and deceived, because they must know that third persons are likely to rely on their stating what they personally know, or had duly inquired about; and if the defendants, in this case, did not make the recommendation upon such authority or information as they ought to have acted upon, the jury should charge them. And accordingly the jury found a verdict for the plaintiff for \$2,300.

But on appeal to the Supreme Court of the United States, that court stated "that this instruction, taken in its proper sense, was evasive of the true rule, and calculated to mislead the jury, is manifest, and therefore the judgment must be reversed, and the cause sent down for another trial."

The court refer to the case of *Young vs. Covell*, 8 Johns., 23, and say, "That court declared it to be well settled that this action could not be sustained *without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representations*. The simple fact of making representations which turn out not to be true—unconnected with a fraudulent design—is not sufficient. This decision was made forty years ago, and stands uncontradicted, so far as we know, in the American courts."

This being the law which courts hereafter will probably sustain—a seller, before proceeding to an action of damages for losses occasioned by the misrepresentations of third persons as to the solvency of a buyer, should satisfy himself that he can prove

fraud or an intent to deceive with reasonable certainty. What facts will be sufficient to establish fraud or an intention to deceive, is a question to which no general answer can be given. If he prove that when the party made the representation *he knew it to be false*, the law will infer fraud. If he prove that the party had *some interest* in making a misrepresentation, this will be strong presumptive evidence of an intention to deceive. But in no case can the damages exceed the loss that may be actually and immediately referable to the misrepresentation.*

Such being the law, a seller can therefore place but little reliance upon the favorable representations of others as to the solvency of a party soliciting credit, as a ground of legal protection. If he would hold the person recommending responsible for any injurious consequences that may result from trusting to his recommendations, he must require him to give proof of the faith that is in him by signing a responsible contract. If he consent, this will give rise to the contract known in the law as Guaranty or Suretyship, whereby "one person is bound to

* "If," says Pothier, "you had only recommended Peter to his creditor as honest and able to pay—this was but advice, and not any obligation; and if Peter was at the time insolvent, you are not bound to indemnify the creditor for the sum which he loaned to Peter by means of your advice, which he has lost: *Nemo ex consilio obligatur*. The rule is the same if the advice was given rashly and indiscreetly without being duly informed of the circumstances of Peter, provided it was sincerely given. But if the recommendation was made in bad faith, and with knowledge that Peter was insolvent; in this case you are bound to indemnify the creditor."

another for the promises or engagements of a third person."

III. GUARANTEES.

Limiting our remarks concerning guarantees to those points which it concerns a seller to observe before parting with his goods upon the faith of a guarantee, it may be proper to suggest to him the importance of keeping in mind the circumstances under which guarantees, in the majority of cases, are made. He should reflect that they are usually given from motives of neighborly kindness or natural affection—rarely with any interest or expectation of reward at all commensurate with the undertaking, and generally without expectation of loss. He should foresee that at the very time when the guarantee may be serviceable to him, that is, when the debtor has failed, he will probably find the guarantor moaning over the hardship of paying the debts of another without value received, and searching "wi' sharpen'd, sly inspection" for a loop-hole or flaw in his engagement, by which he may escape its consequences. He should understand, too, that the law will favor the surety at least so far as not to bind him beyond the precise scope of his undertaking—that is, as in the case of *Shylock vs. Antonio*, it will give him his pound of flesh, but not one drop of blood.

All these probabilities, duly considered, will render him cautious at the time of taking the guarantee to observe that the requirements of the law respecting it are fully complied with.

First: *The law ordinarily requires that a guarantee shall be in writing and signed by the guarantor.*

The policy of reducing all contracts to writing has already been adverted to; but this contract, especially by force of statute law, will not generally be valid, except it be in writing. Nearly all the States* have substantially adopted the provision of the English Statute of Frauds, enacting that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debts, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged," or his agent duly authorized.

Courts, it is true, to prevent frauds and promote justice, have seen proper to divide promises to pay the debts of another into *original* and *collateral* promises, and to hold that the former need not be in writing; but they have submitted no general rule that we are aware of that would be of service, practically, in determining this distinction. Thus, it is held that if you promise to pay a debt for which an attachment has been issued, and the attachment is withdrawn at your request, the guarantee is good; but it must be in writing. It is a collateral undertaking. But if the property be not only relieved from the attachment, but delivered

* In Pennsylvania, this provision was enacted April 26th, 1855, not however to take effect "until the first day of January next; or apply to or affect any contract made, or responsibility incurred prior to that time; or for any contract the consideration of which shall be a less sum than twenty dollars."

over to you at your request, this will make it an original promise and need not be in writing. Where, however, the captain of a military company stopped the waiters from collecting pay from the members of his troop for a Fourth-of-July dinner they were eating, saying he would be responsible for them, it *was held* that this promise was not an original but a collateral undertaking, and therefore, to be binding, should have been in writing.

To determine whether a promise be an original or collateral one, it is said that the entry in the books of the seller is often of great importance. Therefore, when in the hurry of business, a seller has overlooked the necessity of reducing a promise of guarantee or responsibility for the purchases of another to writing, the best thing he can probably do will be to charge the goods so furnished at once to the guarantor. This will not be conclusive, but it is certain that if he charge the party for whose use they were obtained, or if he charge them both, the guarantor will not be liable.

Guarantees of commission merchants under a *del credere* commission, are held to be original undertakings and need not be in writing.

No particular words or form is necessary to constitute a guarantee, but the following requisites should appear on its face:

*The promise in plain, unambiguous words ; a valuable consideration ; and the names of the party promising, and the person in whose behalf the promise is made.**

* In the case of *McCalmont, Br's. & Co., v. Susan Lawrence*,

It is not necessary that the name of the person for whom it is intended should appear on its face, but if it do, it must appear correctly. Where a letter of guarantee addressed to James and Jeremiah N. was presented to James and Joseph N., who furnished

2 How. U. S. C. Rep. 426, we find the following model letter of guarantee for a creditor to receive. It cost the lady drawer nearly \$50,000, and therefore its virtue has been demonstrated.

"Messrs. McCalmont, Bros. & Co., London. Gents: In consideration of Messrs. J. & A. Lawrence having a credit with your house, and in further consideration of one dollar paid me by yourselves, receipt of which I hereby acknowledge, I engage to you that they shall fulfill the engagements they have made, and shall make with you for meeting and reimbursing the payments which you may assume under such credit at their request, together with your charges, and I guaranty you from all payments and damages by reason of their default.

"You are to consider this a standing and continuing guaranty without the necessity of your apprising me from time to time of your engagements and advances for their house; and in case of a change of partners in your firm or theirs, the guarantee is to apply, and continue to transactions afterward between the firms, as changed, until notified by me to the contrary.

"Yours respectfully,

"SUSAN LAWRENCE."

In the argument for the defendant in the Supreme Court of the United States it was objected that the consideration was past and not present, for the letter of credit had been already delivered to J. & A. Lawrence by the agents of the London house; and secondly, that the consideration of \$1 was merely nominal, and not sufficient to sustain the guarantee, and in fact that it was not received. But the court say "*As to the last point we feel no difficulty. The guarantor acknowledged the receipt of \$1, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts.*"

goods upon it, and for whom it no doubt was intended, as there was no other similar firm in the city, it was held the guarantor was not liable for goods furnished by that firm. Where a letter of credit was addressed to B & Co., requesting them to allow A to draw bills on them to a certain amount, and B & Co. having dissolved their partnership, A drew on B, who accepted, it was held the guarantor was not liable to B on the letter of credit. A guarantor has the right to say that these were not the persons to whom he was willing to be bound.

Whether *a consideration must appear upon the face of a written guarantee* has been a question much discussed. The decisions of the courts in the different States upon this point have not been uniform; but the prevailing rule of American law seems to be, that if the contract is in writing and signed, the consideration may be proved, though not expressed. The question, however, can hardly be called settled; and as it will not cost much additional ink or paper, it will be policy to have a consideration appear on the face of the guarantee. If the guarantee be given before or at the time of credit, the memorandum should contain a request for the credit. If given after, it should contain a request for further time or further credit in consideration of which the payment in respect of past transactions is guaranteed. All, however, agree, that when a consideration is not expressed it must be proved to sustain a guarantee. If a friend of mine is in your store buying goods, and after he has bought them I hand you a memorandum stating, "If he do not pay you, I will," it is

valueless in law for want of consideration.* If, however, I do this *before* he has purchased, it will be binding, for the consideration is the parting with the goods. So if A draw up a note to your order and I write under it, "I guarantee the above," and you deliver goods upon it, it will be binding without distinct consideration, for it was all one entire transaction; but if I can show (and parol evidence will be admissible to prove it,) that the promise of A and my promise were not concurrent, the legal effect will probably be different. *Place no dependence then upon guarantees of a credit already given unless there is a consideration for the guarantee.* The only exception to the rule that the guarantor is not liable under such circumstances, is where the credit was originally given at the *guarantor's request*, though without promise of guarantee, and he afterward expressly promises to become liable for it.

The provision in the Statute of Frauds which we have cited does not require the agreement itself to be in writing, but some note or memorandum there-

* In *Allnutt v. Ashenden*, 5 M. & G., 394, the following guarantee was held valueless for want of consideration.

"Sir: I hereby guarantee Mr. John Jennings's account with you, for wines and spirits, to the amount of £100.

E. ASHENDEN."

"By account," says Tindal, C. J., "I understand the parties to mean some account contained in some ledger or book: and the case shows that there was such an account existing at the time." It has, however, been remarked, that if mercantile witnesses had been called, they would probably have testified that the word account would be understood in the commercial world as "*dealings*," when the guarantee would have held good for future advances to the amount specified.

of; hence invoices, letters, and other written papers connected with the transaction, may either be used to explain a memorandum of the agreement, or they may themselves afford sufficient matter to preclude the necessity of any more formal agreement.

II. Remember that guarantors and sureties are favored in both courts of law and equity, and that they are not bound beyond the precise scope of their engagement.

Courts of law and equity take into consideration the circumstances under which the greater portion of the contracts of guarantee and suretyship are made; and as the question usually is, which of two innocent parties shall sustain a loss, they cast the responsibility upon the surety, it is true, if he have plainly assumed it, but neither of them will do this beyond the precise scope of his undertaking. Hence, where A of New York gave a letter of credit to B, addressed to C, of Albany, requesting C to deliver goods to B on the best terms to a certain amount, and C, instead of delivering the goods himself, gave B a letter to D, in Geneva, requesting him to deliver goods to B to the amount, and engaging to be responsible, and D accordingly delivered the goods to B; in an action by C against A for the amount, it was held that the engagement of A to C did not make him responsible for goods furnished by any other person.

In view of this principle it is especially necessary to guard against construing words of recommendation into promises of guarantee. It is a common occurrence for persons recommending friends to merchants, to use in their letters strong language, and in some cases to close them with words import-

ing a willingness to guaranty, as "I would be willing to guaranty," or "I have no objection to guaranty his contracts with you;" and it is quite as common for merchants to be deceived into interpreting expressions like these to mean valid guarantees. That is, they furnish goods or assume obligations for the party recommended, neglecting, however, to notify the writer that they consider his letter as a guarantee until the actual debtor has failed, when it is too late to give such notice or claim their responsibility.

Neither courts of law nor equity will compel a man to pay the debts of another, unless his undertaking manifests a *clear intention* to bind himself for the debt. They will not construe words of recommendation or words susceptible of a different construction, or even overtures of guarantee, into actual guarantees. They will hold the words, "*I have no objection to guaranty you against any loss from giving this credit*" to be a mere *overture* to guaranty, requiring notice that it is considered as a guarantee, or proof of the assent of the writer to consider it as such. Whenever a seller intends to bind another as a guarantor, he should require a plain and explicit declaration of obligation.*

* In the case of *Russel v. Clark's Ex'rs.*, 7 Cranch, 69, we find an instance illustrative of this point, where the plaintiff sought to hold the defendants liable for losses sustained by a credit given upon the faith of the following letters. We can readily imagine an excuse for the counsel of the plaintiff advising him to proceed without proof of the writer's fraud, for fees may have been scarce at the time, but we are surprised to find the case in the Supreme Court of the United States. Perhaps the law, at that period, was not so well settled as it now is:—

III. *When you have acted upon, or availed yourself of a guarantor's promise, give him notice of your acceptance within a reasonable time afterward.*

A promise of guarantee must of course be accepted to make it a contract. If I write a promise

"PROVIDENCE, 20 January, 1796.

"Nathaniel Russell, Esq.—Dear sir: Our friends, Messrs. Robert Murray & Co., merchants of New York, having determined to enter largely into the purchase of rice and other articles of your produce in Charleston, but being entire strangers there, they have applied to us for letters of introduction to our friend. In consequence of which, we do ourselves the pleasure of introducing them to your correspondence as a house on whose integrity and punctuality the utmost confidence may be placed; they will write you the nature of their intentions, and you may be assured of their complying fully with any contract or engagements they may enter into with you. The friendship we have for these gentlemen induces us to wish you will render them every service in your power; at the same time we flatter ourselves the correspondence will prove a mutual benefit.

"We are, &c.,

"CLARK & NIGHTINGALE."

On the next day C. & N. write.

"PROVIDENCE, 21 Jan., 1796.

"Nathaniel Russell, Esq.—Dear sir: We wrote you yesterday a letter of recommendation in favor of Messrs. Robert Murray & Co. We have now to request that you will render them every assistance in your power, and that you will, immediately on the receipt of this, vest the whole of what funds you have of ours in your hands in rice on the best terms you can. If you are not in cash for the sales of the China and Nankins, perhaps you may be able to raise the money from the bank until due; or purchase the rice upon credit till such time as you are to be in cash for them: the truth is, we expect rice will rise and we want to improve the amount of what property we can muster in Charleston, vested in that article, at the current price. Our Mr. Nightingale is now

of guarantee in the most approved form, and you do not accept it, it is not binding upon me. This is well understood; but men of business do not seem to understand so well that the guarantor must in all cases have notice of its acceptance within a reasonable time. It is true in some cases this notice will be implied or inferred. Thus, if I go into your store with B, and hand you a memorandum in writing, requesting you to let him have what goods he may want, and I will guaranty the payment, and thereupon you furnish the goods, a notice of acceptance will be implied. But if I, at a distance, send you a guarantee or a letter of credit of future application and uncertain amount, I must have distinct and express notice within a reasonable time afterward that you have accepted the guarantee, and delivered goods upon it. Some authorities, indeed, hold that the guarantor must not only have reasonable notice of the acceptance of this guarantee, but also of the *amount* of goods delivered upon it, and that payment of the same has been demanded of the original debtor. The principle of the law requiring notice to render a guarantee valid, is founded upon the strong reason of justice to the guarantor that he may know when, and to whom, and to what extent he is bound; and consequently he may be able to watch over the debtor for whom he engages, and in season

at Newport, where it is probable he will write you on the subject.

“We are, &c.,

“CLARK & NIGHTINGALE.”

“Had it (the letter first above recited,) been such a contract,” (a contract of guaranty) the court say “it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagements.”

demand such counter securities as may be useful to him.

Where in the case of a continuing guarantee it may be inconvenient to give notice of the credits given upon the faith of it from time to time, the privilege of dispensing with such notice should be expressly stipulated for in the guarantee itself.*

IV. *In determining the extent of promises of guarantee, adopt a strict construction; or, in other words, do not suppose that they contain any thing more than the words plainly and clearly express.*

It is always important to bear in mind that a surety is never bound beyond *the precise scope of his undertaking*, and that in case of loss, it is safe to assume that he will seek every loophole or flaw in his engagement by which he may evade responsibility. The rule adopted in construing guarantees by the Supreme Court of the United States (1 How. 186,) is "that construction which ascribes the most reasonable, probable, and natural conduct to the parties. In the language of this court in *Douglass v. Reynolds*, 7 Peters, 122, 'Every instrument of this sort ought to receive a fair and reasonable interpretation, according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms.'" There are, however, many promises of guarantee accepted in good faith by merchants daily of which it is extremely difficult to determine accurately the import; and when the trial comes, it appears that the merchant under-

* See Susan Lawrence's guarantee, p. 197, note.

stood it one way and the guarantor another. Thus, suppose I engage to become responsible for another to the amount of \$1000, is this guarantee terminated when that amount has been trusted and paid for; or does it continue as long as that amount, credited from time to time, remains unpaid? Or, to take two actual cases. In the case of *Mason v. Pritchard*, 12 East, 227, the defendant engaged, in writing, to guaranty the plaintiff "for any goods he hath or may supply my brother W. P. with, to the amount of £100;" and it appeared in evidence that at the time this guarantee was given, goods had been supplied to W. P. to the amount of £66; and another parcel was supplied afterward to the amount of £124; all of which had been paid for, and the sum now in dispute was for a still further supply of goods to W. P.; the question was: Did the above guarantee cover it? or in other words, Was it a limited or continuing guarantee? The court were unanimously of opinion that this was a continuing guarantee, "to be answerable at all events for goods supplied to his brother *to the extent of £100 at any time, but that he would not be answerable for more than that sum.*"

In the other case of *Rogers & Lambert v. Warner*, 8 Johns., 119, the plaintiffs gave in evidence the following writing:—

"Messrs Rogers & Lambert: If Elias Warner and D.W. Bostwick, our sons, wish to take goods of you on credit, we are willing to lend our names as security for any amount they may wish." And it appeared that the persons in whose favor it had been drawn, took goods of the plaintiff several times on credit for which they paid from time to time, but about a

year and a half afterward failed, owing the plaintiffs a balance on a note given for goods so furnished. Was this balance covered by the above guarantee? The court held "the true construction of the letter of credit is, that it is to be confined to the *first parcel of goods*. The letter gave an unlimited credit as to *amount*. Here it was explicit, but was silent as to the continuance of the credit to future sales. The expression of one is an exclusion of the other. Judgment ought to be given for the defendants."

The rule then would seem to be that where a guarantee is limited as to amount, but not as to time, it may be construed as a continuing guarantee, but where neither amount nor time is expressed upon its face, it cannot be extended beyond the first parcel of goods delivered upon it, unless otherwise stated in express terms or by necessary implication. The decisions, however, are not uniform,* and the

* It may be of service to subjoin some adjudicated guarantees interpreted by courts of high authority. The following have been held to be *continuing guarantees*.

In *Merle v. Wells*, 2 Camp. 413, where the defendant wrote to the plaintiffs the following letter: "Gentlemen: I have been applied to by my brother, William Wells, jeweler, to be bound to you for any debts he may contract, not to exceed £100 (with you) for goods necessary in his business as a jeweler. I have wrote to say, by this declaration I consider myself bound to you for any debt he may contract for his business as a jeweler, not exceeding £100 after this date," Lord Ellenborough held, "By such an instrument as this a continuing suretyship is created to the specified amount."

"In *Rapelye & Purdy v. Bailey*, 5 Conn. 149, the plaintiffs gave in evidence the following letter:—Messrs Rapelye & Purdy, Gentlemen: My brother, Roswell, is wishing to go into business in New York, by retailing goods in a small way. Should you be dis-

safer rule for a seller to adopt, is that of strict construction, or in the language of Judge Story, in

posed to furnish him with such goods as he may call for, from \$300 to \$500 worth, I will hold myself accountable for the payment, should he not pay as you and he shall agree.

ROGER BAILEY."

Held a continuing guarantee, and "that the plain meaning of the agreement undoubtedly is, if you, the plaintiff, will within a reasonable time supply my brother with goods 'as he shall want them,' not exceeding \$500, unless he shall pay you agreeably to contract, I will be responsible."

In *Clark v. Burdett*, 2 Hall, 197, the instrument was as follows, viz: "New York, April 30, 1828. I hereby guaranty the payment of any bill or bills of merchandise Mrs. Phillips has purchased or may purchase from E. P. Clark & Co., the said Mrs. Phillips having the privilege of ninety days credit on the purchases made by her, the amount of this guarantee not exceeding \$200, and this guarantee to expire at the end of one year from this date.

JACOB BURDETT."

Held, "that this guarantee is a continuing one, and by its express terms intended to secure any sale of goods during the period of one year, not exceeding the specified amount."

In *Bent v. Hartshorn*, 1 Met. 24, the guarantee was: "Messrs. Bent & Bush, I hereby agree to be responsible for the price of hats and other goods purchased of you, either by note or account, by H. Hartshorn, at any time hereafter to an amount not exceeding \$1000.

ROLUN HARTSHORN."

Held, "the words *at any time hereafter* leave it indefinite as to time, and it must continue at least until the guarantor gives notice that he will no longer be liable."

In *Grant v. Risdale*, 2 Har. & Jons. 186, the defendant closed a letter of credit in favor of his son as follows: "For their plan I refer to themselves; have therefore only to add that I will guaranty their engagements, should you think it necessary, for any

Cremer v. Higginson, 1 Mas. 323, "in doubtful cases the presumption ought to be against holding a guarantee to be continuing."

transaction they may have with your house." *Held*, a continuing guarantee until countermanded by the defendant.

The following have been held to be *limited* guarantees :

In *Cremer v. Higginson*, 1 Mas. 323, one of the points was, whether the following letter was a limited or continuing guarantee.

"Boston, Dec. 15, 1808. Messrs. Thomas & Adrian Cremer : Our friends and connexions, Messrs. Stephen and Henry Higginson, contemplate under certain circumstances making a considerable purchase of goods on the continent, and for that purpose are about to send an agent to Europe. They wished to obtain a letter of credit from us to increase their means, and to be used or not, as circumstances may require. As we are now indebted to you, and have no funds on the continent on Europe, we told them we could not give a positive letter of credit for any sum, but that we had no doubt you would be disposed to furnish them with funds under our guarantee. The object of the present letter is therefore to request you, if convenient, to furnish them with any sum they may want, as far as \$50,000 ; say fifty thousand dollars. They will reimburse you the amount they receive, together with interest, as soon as arrangements can be made to do it ; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount, and are with great regard, gentlemen,

"Your friends and servants,

"STEPHEN HIGGINSON & CO.

Signature of S. V. S. WILDER."

Story, J., *held*, "that in its terms this is a guarantee limited to a single advance of \$50,000, and that when once this sum is advanced, the guarantors are no longer liable for future advances," although at the time of such further advances, the sum actually advanced had been reduced below \$50,000 by the payments of the debtors.

In *White v. Reed*, 15 Con. 458, the following guarantee was introduced. "To Wm. A. White—Sir: For any sum that my son,

V. *When you have received a promise of guarantee in the name of a partnership, examine closely whether it comes within the scope of their business to give such a guarantee; and if you have a doubt, demand the signatures of all the partners.*

The general rule of law is, as we have before stated, that if an act of one partner do not concern the partnership business, or be not in the usual

George Reed, may become indebted to you, not exceeding \$200, I will hold myself accountable.

THOMAS REED."

The court *held*, "the words are '*any sum*'—not sums—which seems to imply a single transaction. The words are evidently satisfied when any one indebtedness is incurred; nor is there any thing in the nature of the contract, nor in the language used, from which we are able to infer that any continual dealings were contemplated."

In *Boyce v. Ewart*, 1 Rice, 126, the guarantee was in these words: "Our brother, Samuel Ewart, is about to commence business, on his own account, in Columbia. To assist him in which he will stand in need of your aid and indulgence, which if you render him, in case of his failure and delinquency we will indemnify you to the amount of \$4000."—*Held* that "it was not a continuing guarantee, but applicable to the bearer's commencing in business, and that as soon as the bearer had refunded \$4000, the guarantee ceased."

In *Whitney & Schuyler v. Groot*, 24 Wend., 82, the guarantee was as follows. "Messrs. Whitney & Schuyler—Gentlemen: We consider Mr. James L. Van Ess good for all he may want of you, (and we will sell him all he reasonably asks of us on credit,) and we will indemnify the same. (Signed),

SANDERS & GROOT."

The court say "The instrument is certainly imperfect and obscure: and it is surprising business men should have parted with their goods upon the strength of it before explanation." *Held*, however, as a guarantee for the first parcel of goods, but no more.

course of their trade, though made in the name of the firm, it will not be binding on the other partners, except by their express or implied assent. Courts always look at guarantees or letters of credit given in a firm name, and contrary to their interests, very strictly; and in the language of Buller, J., "if there be any ground for a suspicion of covin, or such gross negligence as may amount to or be equivalent to covin, the partners shall not be liable."

VI. *Remember that a change in your firm, either by the admission or the retirement of a partner, although the name of the copartnership be not changed, will extinguish all guarantees that do not expressly provide for these changes.*

We have before stated that a guarantee addressed to B & Co. is not valid in the hands of B alone; and it is equally well settled that if any partner be taken into a firm, or retire from it, a guarantee given to the old firm does not continue to the new one. It is not necessary to detail the reasons for the decisions which have established this principle; but, if necessary, they would probably be found in the language of Lord Mansfield, when he says, "it is very probable that sureties may be induced to enter into such a security by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things there cannot be a partnership consisting of several persons in which there are not some possessing these qualities in a greater degree than the rest; and it may be that the partner dying or going out may be the very person on whom the surety relied; it would therefore be very

unreasonable to hold the surety to his contract after such change." The principle applies not only to guarantees of credits, but guarantees for the good conduct of clerks, or the fidelity of officers in a bank or other corporation.

VII. Remember that within a reasonable time after default of the debtor, you must notify the surety of the default, and do no act which will impair the immediate right of redress by the surety, or he will be discharged. A creditor is not bound in law, even at the request of the surety, to proceed immediately in an action against the principal debtor; but if he bind himself by a valid agreement to give time to the debtor—or if he release the debtor, or destroy the collateral securities he may hold, without consent of the surety—or if his delay in proceeding against the debtor amounts to a gross negligence, and by which the surety has lost his security, the latter is discharged. A guarantor or surety has always the right, by paying the debt, to substitute himself in the place of the creditor, and is therefore entitled not only to receive from him all the securities held by him for the principal debt, but to be placed in as favorable a position as the creditor himself stood at any time after default of the debtor.

VIII. *Where you have several debts owing to you by a debtor, some of which are guarantied and others are not, and the debtor makes a payment on general account, without expressing the mode of its application, apply it to the account of debts not guarantied.*

A debtor, when paying money on account of his indebtedness, has a right to direct its application as

he pleases, and his direction must be observed. But when he does not specify on what account the payment is made, the creditor, at the time of payment, may apply it at will, and it is to his interest to apply it to those debts for which he has the least security. Where neither the debtor nor creditor make the application, the law adopts rules of its own, to which we may advert in a subsequent chapter.

And *lastly*, if the surety has received counter securities from the debtor for becoming his guarantor, and both fail, as frequently happens, the creditor has a right to have those counter securities applied to the payment of his debt, and this right he can enforce against the consent of both the debtor and the surety.

A word to the SURETY. On becoming surety for another, and you take a bond of indemnity, let it contain two stipulations—one, that he shall indemnify you against loss; and another, that he shall perform the obligation required—for then, if it contain both these stipulations, and not otherwise, it will be available before you shall have paid the suretyship debt, and you can proceed against the debtor in the event of his default as soon as the creditor can proceed against you.

CHAPTER IX.

INSURING GOODS.

HOW TO INSURE GOODS LEGALLY.

It is unfortunately an incident of all property, except land, that it is constantly liable to perils that may cause its destruction. The two elements, fire and water, annually destroy millions of valuable property; and if merchants could not protect themselves against their ravages, commerce would be paralyzed. Fortunately it has been found to be a safe and lucrative business, notwithstanding the immense losses to which they are liable, for individuals or associations to agree to indemnify, (for certain considerations and upon certain prescribed terms and conditions,) the owners of property against the damages occasioned by fire or the perils of the sea. This contract has given rise to the Law of Insurance, to which we propose to direct our attention, for the purpose especially of comprehending how we may insure goods legally.

In Insurance, it must be understood that merely taking out a policy, signed by a company, however wealthy, is not in itself a protection. The law imposes certain duties upon the assured, and requires him to adopt certain rules of conduct which, if he violate, whether through ignorance or design, he

may lose the right of ultimately deriving any benefit from the contract. A slight mistake, it has been remarked, in describing the condition or situation of the property insured; or an innocent concealment of some fact which the law requires the assured to disclose; or a trifling deviation from the rigid construction of the instrument, often may vitiate and destroy the policy, blasting every prospect of remuneration for heavy losses which the insured has sustained, and which he is thus forever prevented from recovering.

Insurance upon goods is of two kinds—against fire, and against the perils of transportation by land and by water. The contract is an undertaking on the part of the insurers to indemnify the insured against certain enumerated perils that may happen to certain specified property. The party who takes upon himself the risk is called the *insurer*, sometimes the *underwriter*, from subscribing his name at the foot of the policy; the sum paid to the insurer as the price of the risk is called the *premium*; and the instrument in which the contract is set forth is called the *policy*. But in all cases the contract is made subject to certain conditions which the assured must comply with strictly, or his indemnity may be invalid. To these conditions and precautions we will limit our investigations.

I. *Before taking out a policy of insurance, it is prudent to inquire into the solvency of the company in which you propose to insure property; and secondly, to examine carefully the conditions of their policies.*

The object proposed in effecting insurance being security, it is folly to suffer low rates of premium,

acquaintance with the officers, or any other circumstance, to tempt a man into insuring in an office of doubtful solvency. And in estimating the probable solvency of a company, it may be well to note the character and qualifications of the officers; and if men, distinguished for nothing but a want of financial talent, have been appointed to fill the chief offices merely because they had a prefix as "Hon." to their names, it would seem a suspicious circumstance. It may also be sound policy to inquire in what manner the company have settled their previous losses, and whether their names appear frequently as defendants on the records of the courts.

To examine the conditions inserted in a policy previous to accepting it is a dictate of wisdom, not only because a man ought to know what the terms of his contracts are, but in order to know what descriptions and representations the company require from persons desirous to make insurance.

In Philadelphia, the leading insurance companies have recently united in an association known as the Board of Underwriters, and their policies will be uniform.

II. *Before taking out a policy of insurance, ascertain that you have an insurable interest in the property proposed to be insured.*

In all contracts of insurance it is an established rule of law, that to make a policy valid and enable the assured to recover the loss, he must have an interest in the subject *insured at the time when the contract is made, and when the loss occurs.* He must have such an interest when the contract is made, otherwise it is a wager policy, and void; and when the

loss occurs, otherwise he suffers no damage, and can have no claim upon the contract of, indemnity. Hence, if an owner insure his house, and subsequently sell it, though it be burnt within the time limited, he has no legal claim upon the insurance company. It is not, however, necessary for the insured to have an absolute or unqualified interest in the property insured ; a trustee, mortgagee, factor, or agent may legally insure their respective interests, subject to the rules of the different offices. In fact it has been recently decided that a mortgagee who has insured the mortgaged property at his own expense, and for his own benefit, without limiting it in terms to his interest as mortgagee, is entitled in case of loss by fire before the payment of the debt to recover both the amount of his insurance and the mortgage debt. *King v. The State Mutual Fire Insurance Co.*, 7 Cush. (Mass) R. 16.

A person insuring property in which he has no interest, cannot recover back the premium after taking the *chance* of a loss and obtaining from the *generosity* of the insurers the sum insured.

III. *Do not misrepresent or conceal any material fact respecting the property insured ; and if there be a warranty incorporated in the policy, see that its terms are strictly and literally complied with.*

A misrepresentation, if material, vitiates a policy. A misrepresentation is said to be *material* when it communicates any fact or circumstance which may be reasonably supposed to influence the judgment of the underwriters in undertaking the risk or calculating the premium ; and whatever may be the form of the expression used by the insured or his agent

in making a representation, if it have the effect of imposing upon or misleading the underwriter, it will be material and fatal to the contract. "It is a just principle in the law of insurance," says Lord Eldon, "that where a representation is material it must be complied with; if immaterial, that immateriality may be inquired into and shown; but if there is a *warranty*, it is a part of the contract that the matter is such as it is represented to be." It is the practice of most offices to insert the statements or representations made at the time of effecting the insurance in the body of the policy. By this means they become a warranty, and preclude questions from arising upon the subject of the materiality or immateriality of the statements.

The concealment of a fact *material* to the risk will be equally fatal to the contract, on the ground that such concealment is a fraud. "Although the suppression should happen by mistake without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risk run is really different from the risk understood, and intended to be run at the time of the agreement." Thus, in a case where an insurance was made on a warehouse which was separated by one other building from the workshop of a boat builder, which had been on fire in the afternoon of the day when the letter applying for the insurance was written, *it was held* that the circumstance of this fire ought to have been communicated to the company, and consequently they were not liable for the loss resulting from a fire which again broke out in the same workshop, though on a subsequent day.

Among the important conditions usually inserted in policies of insurance on goods, is one which requires the party insuring to describe the building or place in which they are deposited ; also, whether the goods are of the kind denominated hazardous, and whether any manufactory is carried on in or about the premises ; and "if any person or persons shall insure his or their building or goods, and shall cause the same to be described in the policy otherwise than as they really are, so that the same be charged at a lower premium than is herein proposed, such insurance shall be of no force, and the premium paid thereon shall be forfeited.* But a nominal misdescription of a building, as where the premises were described as a "barn" which were agricultural buildings that could not strictly be called a barr, will not vitiate the policy.

Having thus adverted to precautions which are applicable to all kinds of Insurance—Life, Fire, and Marine Insurance—we shall now consider those

* In the case of the New Castle Fire Insurance Company v. Macmoran & Co., "the defendants were held not entitled to recover their insurance because on the face of the policy they had warranted the cotton factory insured by them to belong to the first class of risks when it belonged to the second. The only respect in which the factory differed from one of the first class was in the length of a stove pipe, which was three feet long when it should have been but two. In all other things it was in accordance with the warranty, and an alteration in that particular was made after the execution of the policy by the company and before the loss occurred : but it was held that the variation at the time of the execution of the policy was fatal, and that the warranty must be strictly and literally complied with ; and the defendants, therefore lost their insurance."

points in a great degree peculiar to the insurance of goods—first against Fire, and secondly against Marine Perils.

I. FIRE INSURANCE.

1. In insurance against fire, it is important, on taking out the policy, to *pay the premium*. Policies against fire usually contain a provision or condition that no order for an insurance shall be of any force until the premium be first paid to the company: and all persons desirous of continuing their insurances can do so only by a timely payment of the premium. In marine policies, the non-payment of the premium will not affect the validity of the insurance.

2. *Have the property which you desire to insure described in the policy with reasonable certainty, as to its nature and kind; and where property is held on trust or on commission, care must be taken to have the policy so worded as to cover such property.*

If an insurance be made "*on the stock in a store*, or by any similar words, books of account, written documents, securities or evidences of debt, deeds, writings, money, or bullion, unless particularly specified, would not be protected. So an insurance expressed to be on household furniture, would not protect jewels, plate, paintings, statuary, sculpture, or other similar articles of mere ornament."

With regard to property *held in trust or on commission*, it was decided in the case of *Brichta v. The New York Lafayette Insurance Company*, by the Superior Court of that city, that an insurance of the plaintiff upon goods and furniture in his store, would not

cover property left with him for sale, and upon which he had made advances. Had the policy contained the clause, "his goods and furniture in his store belonging to himself or held in trust by him or on commission," then he would have been entitled to recover for the loss of them upon an averment of interest in himself.

3. *If you insure in more than one office, give notice to each of the other insurances.*

Policies usually contain a condition requiring notice of all previous insurances upon the same property to be given to them at or before the time of making insurance, and of all subsequent insurances, within reasonable time thereafter, or the policy to be void and of no effect; but without this special condition in the policy, a party effecting a double insurance can only recover the actual amount of his loss; and if he sue one insurer for the whole, that insurer may compel the others to contribute in proportion to the sums they have respectively insured.

4. *If you purchase premises or goods insured, take an assignment of the policy, and submit it to the office for their approval within the time limited in the policy.*

It has been before observed that the insured, in order to recover on a policy of insurance, must have an interest in the subject of the insurance at the time of the insuring, and also when the loss happens. The mere assignment of a policy is useless, unless the subject insured is assigned also; but if a policy be assigned to a person already in the possession of the subject insured, and the office allows the assignment, it will bind them—the assignment, as

against them, being considered a new contract. Without *notice*, however, it is very questionable whether the holder can have any legal demand against the Insurers, notwithstanding the assignment; and if the assignment be made to him after the fire happens, and without consent of the office, though he may have become possessed of the premises or goods before the time of the fire, it is certain he cannot recover.

5. *If, after taking out the policy, and before its termination, you wish to use the premises for a purpose that may increase the risk, give notice to the company of the fact, and have their consent indorsed on the policy.*

A building was insured and described as a tea warehouse, or for the storing of tea, and afterward, without consent of the company, the owner used it for storing drugs; the policy was held to be void.

6. *Make no alteration, however slight, in the policy after it has been executed.* A policy, when executed, is considered a sacred agreement, and no alteration can be made by either party without avoiding the contract. The only mode by which an alteration can be made in an instrument of this kind, where either party refuses his assent, is by an application to a court of Chancery, where it must appear, by undoubted evidence, that the party applying was mistaken in the terms and effect of the policy, and that a correction of such mistake cannot prejudice the rights of the other.

7. *As soon as a loss has been sustained on property insured, give immediate notice to the office, and deliver*

a statement supported by the evidence required by the rules of the office.

In many of the English fire insurance policies there is a principal article, requiring persons sustaining any loss to make proof of the same, by oath or affirmation, and by the production of books of accounts or other proper vouchers, and "procure a certificate under the hands of the minister and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing that they are well acquainted with the character and circumstances of the person or persons insured, and do know, or verily believe, that he, she, or they really, and by misfortune, without any fraud or evil practice, have sustained by such fire the loss or damage as his, her, or their loss, to the value therein mentioned." The construction of this article is, that the production of such a certificate is a condition precedent to the payment of any loss; and if the minister refuse to give it, no matter how wrongfully, the insurance money cannot be recovered. It is needless to express any opinion of such a contemptible provision. In some of the American policies there is an article stipulating for the production of a certificate from the nearest magistrate or notary as to the character and circumstances of the assured, and the amount of the loss; and where this provision is inserted, the certificate must be obtained. This requirement has given rise to difficulty, it is said, more frequently than any other cause, notwithstanding the fact that the courts have been disposed to construe it liberally, by refusing to go into a nice calculation of distances to

ascertain the nearest magistrate from whom the certificate should come. Proximity is all they have required.

Where the proofs of loss furnished by the insured are deemed insufficient by the Company, it is their duty to notify the former of the defect, so that he may have an opportunity to remedy it before it is too late; and "if they neglect to do so, their silence will be held a *waiver* of such defect in the preliminary proofs, so that the same shall be considered as having been duly made according to the conditions of the policy."

A want of due diligence in giving an Insurance Company notice of a loss, is a defect which cannot be remedied; and as it often proves fatal to the interest of the insured, its importance is obvious.

II. MARINE INSURANCE.

1. A contract by one party to indemnify another against certain enumerated perils of the sea involves the Law of Marine Insurance, and to consider even its leading points would require more space than we can devote to the subject. In Marine Insurance as in Fire Insurance the law requires that the insured shall have an insurable interest in the subject matter of the contract to entitle him to an indemnity; and compels him, when effecting the insurance, to state all facts material to the risk within his knowledge, and which the underwriter could not be expected to know without such communication. It is customary for underwriters to incorporate in the policy certain *express warranties* which the insured must strictly comply with, or he cannot recover. Of this nature

are those provisions stating the national character of the property insured, and that the traffic is not prohibited by the laws of the land. When the insured enters into an engagement, as sometimes he does, that the ship or goods are *neutral or neutral property*, he engages that they are owned by persons resident in a country at peace when the risk begins and who have the commercial character and rights of subjects of such country, and that the ship and goods are accompanied with all documents and papers necessary to show that they can legally claim the protection afforded to neutral property. In addition to the warranties expressed in the policy, the law *implies* certain warranties, such as, that the *ship is seaworthy* at the commencement of the voyage; that she will pursue her voyage by the *customary route*, and in the usual manner; and that she shall be employed, navigated and conducted in a legal manner. If the parties wish to protect themselves by any agreement not implied by the law, they must be careful to have it clearly expressed in the policy; no conversation nor letters which may have passed between them can form any part of the agreement, or have any weight in controlling its effect unless expressly referred to in the policy.

2. Marine policies with reference to the amount of interest are divided into *open* and *valued* policies. In the former the amount of the interest of the insured is not mentioned, but is left to be ascertained in case a loss shall happen; but in a valued policy a value is set upon the ship or goods at the time of effecting the insurance and inserted in the policy. In case of loss the value will not be questioned unless

the valuation was a mere cover for a wager policy, or unless it so greatly exceed prime cost with expenses added as to raise a presumption of fraud. Where the *profits* expected to arise from a cargo of goods are insured, they should always be insured in a *valued* policy, for then the insured may recover without being compelled to show that any profits would have been made if the loss had not happened.

3. In insuring goods it is usual to insert in the policy the name of the person obtaining it, and state that the property is insured for himself and *all whom it may concern*. This general clause is very important, as it will protect the interest of all for whom it is intended, and who adopt it when made; and the adoption of the instrument by the party for whom it is intended at any time before loss, and in many cases after, is sufficient, and is equivalent to an original order for insurance. It is also necessary to specify the ship, which is usually done by giving her name and the name of the master; but to prevent the ill consequences of a mistake in these names, it is usual and important to insert after them "or by whatsoever other name or names the same ship or the master thereof is or shall be named or called." Where it is not known in what particular vessel goods may be shipped, an insurance upon them "on any ship or ships" is legal.

4. It is important for the insured to notice that *the voyage proposed is accurately described in the policy, and the time and place at which the risk is to begin and end, and the place of the ship's departure and destination duly stated*; for if a blank be left for the place either of the ship's departure or

destination, the policy will be void for uncertainty. It is also advisable, when insuring goods, to have expressed in the policy that in case the ship be disabled and rendered incapable of proceeding to her port of destination, the risk shall continue upon the goods on board of another vessel to be conveyed hither, and until they are safely and conveniently landed in the port of delivery.

5. The law implies a warranty, as we have stated, that a vessel shall pursue the usual course of a voyage, and consequently any deviation from that course, unless in cases of absolute necessity, which are excepted, will vitiate the policy; hence in insuring goods it is important to have *as much liberty of deviation expressed in the policy as* circumstances may possibly require.

As the premium may be reclaimed when the risk has never attached, and for other causes, the non-payment of it does not affect the contract in Marine Insurance.

6. Losses are of three different kinds—total loss, general average, and particular average.

A loss is regarded as *total*, not only when the subject insured is entirely destroyed, but where the damage by any peril insured against exceeds fifty per cent. of the value. In the latter case, the insured has the option of either promptly abandoning all his interest in the subject insured to the underwriters, or he may decline an abandonment and claim for the actual loss, be it what it may. *General average* occurs where a part of a ship or cargo has been voluntarily sacrificed for the benefit of the rest. The owners of the balance saved are bound to contribute

to those whose property has been sacrificed a proportion of the loss, and for this contribution they are entitled to indemnity from their underwriters in cases where the loss is occasioned by any of the perils insured against. The most usual foundation of general average are the cases of *jettison*, when goods are thrown overboard to lighten a ship in peril, and the cutting away of the ship's masts, cables, boats or rigging. *Particular average* is any partial loss arising from perils insured against, not amounting to a total loss, or damage to the amount of fifty per cent. of the value. In the adjustment of a particular average and a general average there is a material difference, inasmuch as the former is adjusted according to the value of the goods at the time and departure of the vessel, and the latter according to the value at the port of destination.

CHAPTER X.

MERCANTILE ACCOUNTS.

HOW TO KEEP ACCOUNTS LEGALLY.

IN the chapter on selling goods we remarked, "when goods have been set aside to be sent for by the purchaser or to be sent to him, then is the time to make the entry in your books of a charge against him, and such entry will be evidence." The importance of accuracy and system in registering such charges, and in recording the daily business transactions of merchants and traders, is at the present day so generally appreciated as to render any extended suggestions superfluous. Among merchants especially, the remark of a French legislator is practically realized:—"The conscience of a merchant ought to be exhibited in his books. It is there the judge ought to meet it."

In many of the commercial countries of the globe the law prescribes the form of keeping books of account, and in some, severe penalties are imposed for neglecting to keep such books, and for keeping them in an irregular manner. In some the delinquency is punishable by fine; in others it is regarded as a crime. In Holland, France, the two Sicilies, and Portugal, merchants who offend in these particulars, may be declared bankrupts; while in Spain and Wurtemberg they are fined in sums varying

from 1,000 to 30,000 reals for each offence. In the United States, though the law prescribes no form, and visits irregularity with mild penalties, the art of book-keeping has made perhaps greater advances than in any other country of the world. In illustration we would point to the numerous works of American authors which elevate it to a science—the seminaries established to teach it—and to the thousands of accomplished masters of the art who are daily practicing it.

II. The value of books of account, legally considered, is mainly as evidence of indebtedness. As a general rule, the entries may be made either by the party himself or by his clerk. In either case they are admissible as evidence if the entries are original entries, made contemporaneously with the delivery of goods, or the transaction recorded, and by the person whose duty it was, for the time being, to make them. But, before such books can be admitted as evidence in a court, they must be submitted to the inspection of the judge; and if they appear to have been honestly and fairly kept, the party producing them must then make oath in open court that they are the books in which the accounts of his ordinary business transactions are usually kept, and that the articles therein charged were actually delivered, and the labor and services actually performed; that the entries were made at or about the time of the transactions, and are the original entries thereof; and that the sums charged and claimed have not been paid. This leads to the inquiry, "*what are original entries?*"

No precise and unvarying rule has been established as to the moment when the entry must be

made. It is enough if it be made "at or near the time of the transaction." Therefore, where goods were delivered by a servant during the day, and the entries were made by the master at night, or on the following morning, from the memorandum made by the servant, it was held sufficient. But such entries made later than the succeeding day have been rejected. Whether entries *transcribed from a slate or card into a book* are to be deemed original entries, is not universally agreed. In Massachusetts they are admitted; but in Pennsylvania they were in one case rejected, and in another admitted where they were transcribed *forthwith* into the book; (9 S. & R., 285) and not later, in the case of a mechanic's charges for his work, than the evening of the second day. (6 Whart. 189.) In all practicable cases, however, the proper time for making an entry is, as we have stated, *when a purchaser has selected the articles he wants, and has had them set aside, either to be sent for by him, or to be sent to him by the merchant.*

III. In most of the States of this Union there are statutory provisions respecting the admissibility of books of account as evidence of indebtedness, particularly those kept by the parties themselves. In Louisiana and Maryland, (except for sums under ten pounds in a year,) entries made by the party himself are not admitted as evidence. In Connecticut the law prescribes the following requisites to entitle a book of account to full credit: "The book ought to be kept in a fair and regular manner, and the articles truly entered at the time of the delivery or performance of the service, so as to be consistent with and support the oath of the party; for the

book is to be considered as the essential part of the evidence, and the oath of the party as supplementary to it. The entries should be made without erasure, alteration, or interlineation. Merchants and traders should produce their day-books and ledgers, and so of mechanics whose business requires that mode of keeping accounts. The entries should also appear to be fairly made from day to day in the usual course of their business. Where people make single entries only, the account should be fairly and properly dated. Where the books are not regularly kept; where there appear to be erasures, alterations, interlineations, and additions; and where the accounts are made out after the dispute has arisen, there is a strong presumption against their truth, and the party must have other proof to corroborate his testimony to entitle him to recover." (Swift. Ev. p. 83.) The law of credibility, as here stated, prevails generally.

IV. The least suspicious form in which books can be kept is that of daily entries in a single day-book or journal of the debts and credits of the different persons with whom the party deals, in the order of dates, without blanks, chasms, or marginal references. If a mistake be made in an account, it should be corrected, not by altering the original entry, but by a new entry made, debiting or crediting the amount of the error. The charges, too, should be specific and particular; a general charge for merchandise delivered, professional services, or work and labor done by a mechanic, without any specification but that of time, cannot be supported by this kind of evidence

V. A book of accounts is only admissible as evidence of *business actually done*, and not of orders or things to be done subsequent to the entry; and the entry must have been made for the purpose of charging the debtor with the debt; a mere memorandum for any other purpose not being sufficient. Hence, an invoice-book and the memorandums in the margin of a blank check-book, showing the date and tenor of the checks, drawn and cut out of the book, have been rejected. (4 Yeates, 341.)

A merchant's *letter-book* is admitted as *prima facie* evidence of the contents of a letter addressed by him to the other party in the cause, *after notice to such party to produce the original*. It is also evidence that the letters copied into it have been sent, but it is not evidence of any other letters than those which the opposite party has been required to produce.

VI. It is to the interest of a merchant to *forward accounts current regularly*, for an account current not objected to within two or three posts after being received, becomes an *account stated*, of which the advantage is, that it does not require proof of items.

For further information respecting the law of book-accounts we must refer to Cowen & Hill's elaborate note, 491, to Phillips on Evidence, (vol. 2, pp. 682-701.) And for the best system of keeping accounts, is it not detailed in many excellent works on book-keeping?

CHAPTER XI.

MERCANTILE PAPER.

PROMISSORY NOTES—BILLS OF EXCHANGE—DRAFTS
—BONDS, &c.

Book Accounts in modern commerce are no longer favorite forms in which to preserve evidence of indebtedness. The law has not invested their assignment or transfer with any facilities, and a merchant cannot conveniently use them either for the payment of his debts or the purchase of goods. It is therefore becoming the practice, and more generally every year, for merchants to close accounts with their customers by requiring written promises to pay definite sums of money, known as *Promissory Notes*; or written orders or requests, to pay such sums, addressed to persons residing in another State or country, known as *Bills of Exchange*; or orders addressed to persons residing in the same State or country, and usually called *Drafts*. These promises and orders are further designated as **MERCANTILE PAPER**.

The extensive use of Mercantile Paper in modern commerce is due to the fact, that the law regards it with greater favor than any other simple contracts or contracts not under seal, however formal or important. It presumes that a valuable consideration was given for a Bill or Note—and though the maker of a

Note may escape payment when sued by a payee, on the ground of failure of consideration, yet the law compels him to prove there was no consideration. It allows Bills and Notes to be assigned when payment is directed to be made to the payee, or his order, or to bearer, by the latter writing his name on the back of the instrument, and when properly transferred, the holder can sue and recover in his own name; and further, such assignment, when made before maturity, and in the usual course of business and for a valuable consideration, gives the assignee a better title than his assignor had. Any defence or set-off which the maker of the Note may have had against the payee, is not available against a third person, a *bona fide* holder without notice. The law, however, fixes a grave responsibility upon a person who transfers a Note or Bill payable to bearer or order, by writing his name on the back of it. A man may write his name on the back of a Bond or an assignment of a book-debt, and he guaranties nothing more than that it is due and the title is good; but a man who assigns a Bill, or negotiates a Note by putting his name on it, unless he qualifies the act by words limiting his responsibility as "without recourse on me," engages that he will pay it if the proper party does not, provided the holder demands payment and gives him due notice of default. He becomes an *indorser*—a name of ominous import to thousands whose fortunes have been wrecked by unguarded indorsements.

Plain and simple as the leading principles governing Mercantile Paper apparently are, it has in practice been the subject of an immense deal of litigation.

The time and attention of courts, especially in England and the United States, have been engrossed by it, and large volumes would be necessary to give even the substance of the decisions respecting it. It has been said that "the *daily* business of the city of London furnishes hundreds of cases where the continental jurists could afford no information to clear away any practical doubts, or to assist in forming any safe and satisfactory judgment;" yet if we trace these difficulties to their source, they will generally be found to originate in a neglect of, or a departure from those formula established by mercantile usage and sanctioned by law. As our object is not to exhaust the law upon the theme, but to discover a system of general rules for practical use, we shall limit our investigations to the points likely to be of the most general and practical importance.

I. PROMISSORY NOTES.

1. *Before taking a Promissory Note, observe whether it is drawn in the usual or a regular form; and if not, whether it comes within the legal definition of a Promissory Note.*

A Promissory Note has been defined to be a written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein. The person who makes the note is called the *maker*, and the person to whom it is payable is called the *payee*, and when it is indorsed by the payee he is called the *indorser*, and the person to whom the interest is transferred by the indorsement is called the *indorsee* or *holder*.

If any instrument, purporting to be a Note, be so defective in form as to want the essential requisites of a Note, it will amount to nothing more than a parol contract, and as such, in the hands of any holder, subject to all equities existing between the original parties.

The common form of a Promissory Note, in the United States, is:—" \$1000. (place) (date) .
——days (or months) after date, I (or we) promise to pay to the order of A B One Thousand Dollars, value received." Signed "C D." In Pennsylvania it is customary to insert the words "without defalcation," before "value received;" and in Missouri, to render a Note negotiable, it is said a statute regulation requires that the word "negotiable" appear on the face of it. A modern innovation, adopted by mercantile men to facilitate the transfer of Notes without requiring the holder's indorsement, is to make them payable to the maker's own order, with his indorsement, sometimes expressing, "for value received" of the party to whom it is given. No particular words, however, are necessary to constitute a Promissory Note, and the form may be varied at will, provided *it always amounts to a written promise for the payment of money, absolutely and at all events, and provided it interferes with no statute regulation.* Thus, a receipt for money "to be returned when called for," or a promise to be accountable or responsible to an individual named, for a certain sum of money, or an instrument drawn—"I, A B, promise to pay C D Four Hundred Dollars," without any signature at the bottom, has been decided to be a good Note. Even a document in these

words: "Borrowed of J. S. £50, which I promise *not* to pay," was decided to be a valid Promissory Note, and that the word "not" ought to be rejected upon the ground of having been inserted by mistake or fraud, and therefore inoperative. On the other hand, a written promise to pay money, "provided A shall not pay the money by a particular day," or "when A shall marry," or "if A shall marry;" or a Note for the payment of money "when received," or "out of rents;" or "by installments," is not a valid Promissory Note, on account of uncertainty. The essential legal requisites of a Promissory Note are that *it must be in writing—the promise to pay must be expressed*—it must be for the *payment of money*, and money only (not horses nor merchandise)—the amount must be *fixed and certain*, and payable *without condition or contingency* at a *fixed period of time*, or upon some event which must inevitably happen. Where no time or period of payment is fixed, it is a Note payable on demand, and as such requires no other demand than by bringing suit. A Note, payable to a fictitious person, is a Note payable to bearer.

When the date has been omitted, and it is important to establish one, the time will be computed from the day when it was issued or made; and if that cannot be ascertained with exactness, from the day when its existence can first be established. Where the sum in figures, in the superscription, differs from the sum in words in the body of the instrument, the latter is, by our law, deemed the true sum.

One more fact, however, it is important to ob-

serve, and that is: *that the instrument purporting to be a Note has no seal.* Whatever may be its form, if it have a seal, it is a *specialty* and not a Bill or Promissory Note, and consequently an indorsement in blank, on the back of it, does not make the indorser liable as such, and it is also subject, in the hands of the holder, to whatever defences the maker may have against the original payee.

2. *When you have notice of the consideration for which a Note was given, take heed that it is a valuable and valid consideration.*

The consideration of a Note, as has been before stated, in the hands of a *bona fide* holder, without notice, cannot be inquired into; but if he has notice at the time when he obtains it, that the Note is void in the hands of the payee, either from fraud, or want, or failure, or illegality of consideration, he will take it subject to the same equities as that party. A Note drawn by the maker as a gift to a son, or relative, or friend, wants consideration, and an action cannot be maintained upon it by the payee. A Note given by a person to an officer of a *benevolent* society for his initiation fee as a member, or for his quarterly dues, wants a sufficient consideration. The consideration must be a valuable one. It must consist either in some benefit to the party who makes the contract; or forbearance, loss, responsibility, or act, or labor, or service on the other side.

A note is invalid or void where it is founded upon fraud, or upon taking an undue advantage of the maker, as where he is intoxicated, and where the consideration is illegal as for illicit cohabitation, for

contracts for the purchase of a public office, or by way of wager. The only exception to the rule that an indorsee who has notice that a Note wants valuable consideration cannot recover from the maker, is that of *accommodation paper*. "If A makes a Note to B or his Order," says Parsons in his work on Contracts, "intending to lend B his credit, and gives it to B to raise money on, B cannot sue A on that Note; but if he indorses it to C, who discounts the Note in good faith, but knowing it to be an Accommodation Note, and without valuable consideration, C can, nevertheless, recover the note from A. The maker may therefore have a defence against the payee which he cannot have against an indorsee with knowledge of that defence. But this is true only where the consideration paid by the indorsee may be regarded as going to the maker in the same manner that it would if the payee had been promiser and the maker had signed the Note as his surety. In general, Accommodation Notes or Bills are now governed by the same rules as negotiable paper for consideration."

3. In taking a Note *secured by a guarantee* instead of an indorsement, observe that the words "value received," or other words importing consideration, are used: and if the guarantee be upon a separate piece of paper, that it describes the note with sufficient distinctness. It is also important to know that a guarantee, *unless made expressly negotiable*, is good only to him who first takes the Note and advances money on it.

4. *Always present Notes for payment on the day when they become due.* This is necessary to charge indorsers. Where there are no indorsers it is unne-

cessary, for the maker is liable in honor until payment, and in law until the debt is barred by the Statute of Limitations.

In the Treatises on Notes and Bills much space is devoted to the consideration of what constitutes a proper presentment and excuses for non-presentment; but in cities it is customary to deposit Notes for collection in bank, whose officers are presumed to understand their duty, and in other cases all danger may be avoided by uniformly observing the rule of presenting them *on the day they become due*. It is proper, however, to advert briefly to two points. { *When do Notes become due?* and *What is a legal presentment?*

In calculating the maturity of Notes, the first rule is—to *exclude the day of the date*. That is, a Note dated on the first day of January, 1857, payable at ten days after date, without grace, will be due on the eleventh (not tenth) day of January, and with grace on the fourteenth. Another universal rule of the commercial world is to construe a month in all cases of negotiable instruments *to be a calendar and not a lunar month*. Thus, a Note dated on the thirtieth day of January, payable in one month, will become due on the 28th day of February, if the year be not bissextile, and if it be, on the twenty-ninth day of February, and grace is to be calculated from and after the 28th or 29th day of February accordingly. A Note dated on the twenty-ninth day of November, payable in three months, is due, including days of grace, on the third of March following. These days of grace, which take their name from being days of indulgence to the maker, originated in a usage of merchants at an early period, when pre-

cious metals were scarce. The usage has now become a positive right; and in England and America, and most commercial countries, with the exception of France, it can be insisted on by the maker, whether the Note or Bill be payable at a certain number of months or days after date, or after sight, *or (generally) at sight*. But Notes payable *on demand* are not entitled to grace. The principal rules with regard to the computation of these days of grace are that they are to be computed according to the law of the place where the Note is payable—that they are to be calculated exclusive of the day when the Note would otherwise become due—and that they are to be counted without deduction or allowance for Sundays or holidays, which, though they cannot protract the time of payment, may nevertheless shorten it. Thus, for example, a Note drawn in America but payable in France, is not entitled to grace. A Note drawn in England or America, dated the twenty-second day of September, payable in three months, would become due on the twenty-fifth of December, but as that is Christmas Day, it is payable on the twenty-fourth; and if that happen to be a Sunday, it is payable on the twenty-third. And if the maker were a Jew, by whose religious usages abstinence from all secular business is enjoined on Saturdays, it is supposed the Note, in the above case, would be payable on Friday, that is, without any grace.

Secondly, *as to a proper presentment* to charge an indorser; the first requirement of the law is, that if the Note or Bill be payable at a particular place, it must be presented there for payment on the very day it becomes due; but if no place of payment be

designated, it must be presented either to the maker personally, or at his place of business during the usual hours of business, or at his dwelling-house within reasonable hours. If the Note be payable by a firm, a presentment to either of the partners, or at the place of business of the firm, is sufficient; but if given by joint makers, a presentment must be made to all. The bankruptcy, insolvency, or death of the maker will not excuse the neglect to make due presentment; but in case of death it should be made to the executor or administrator, or if none have been appointed, at the dwelling-house of the deceased, otherwise the indorsers will be discharged. Even the fact that the Note or Bill has been lost, mislaid, or destroyed, will not dispense with a regular demand on the part of the holder; but to entitle him to receive payment in such a case, he should come prepared with a suitable indemnity. If, however, the maker has absconded, or if he has removed to another State after the date of the Note, this will dispense with a presentment and demand, and make the indorser *ipso facto* liable without it.

5. *If payment of a note be refused on the day when it is due, be prompt in giving notice of the dishonor to the indorsers, stating the fact, and that you look to them for reimbursement and indemnity.*

In the case of a Foreign Bill of Exchange, or a Bill drawn in one State upon a person residing in another, protest by a Notary is absolutely necessary; but in respect to Promissory Notes, a demand and notice by the holder in person or his agent, whether verbal or in writing, will be sufficient to hold the indorsers, provided the facts can be proved by compe-

tent and disinterested evidence. But inasmuch as by Statute enactments in most of the States, the protests and certificates of Notaries Public are *prima facie* evidence of the facts set forth in them, it is always advisable to place Notes which have not been paid at 3 P. M. in the hands of a Notary. It is his duty to use all due diligence to give notice to the indorsers, and if a loss occur through his neglect, he is liable to the holder.

With regard to the time within which notice of dishonor must be given to the indorser immediately liable to the holder, the rule is this: Where both parties reside in the same town or city, notice must be given him personally, or at his dwelling, or place of business, *at furthest on the next business day after presentment and dishonor*; and where the parties reside in different towns or places the notice, properly directed, must be sent by the post of the next day, or by the next post after the day of dishonor or notice of the dishonor. Where there are several indorsers, each one is allowed one day after receiving notice of dishonor to forward notice to his antecedent indorsers. "Great care should, however, be taken," says Story, "by each successive indorser, in cases of this sort, not to miss a day in duly giving or forwarding notice to the antecedent parties; for, if he should miss a day without any legal excuse for the omission, a link in the regular chain will be broken, and all the prior parties will be discharged from their obligations to him, unless indeed they shall have received due notice from some other party to the Note to whom such indorser is liable." If the indorser's residence is not known, some time is

allowed to make inquiries; and if after the exercise of "due and reasonable diligence" it cannot be found, the holder is absolved from giving notice.

6. *Avoid releasing the makers or prior indorsers of a Note if you would hold the subsequent parties.* A release of the maker, or of one joint-maker of a Note by the holder, is a discharge of all the indorsers, and a release of antecedent indorsers is a discharge of subsequent indorsers. Accommodation Notes are in this respect placed upon the same footing as Notes for value.

7. *Before taking a Note that is overdue, it is advisable to obtain from the maker an admission in writing, or in the presence of witnesses, that he has no defence or set-off.*

A party who takes a Note, even for value, after it has been dishonored or is overdue, takes it subject to all the equities which properly attach thereto between the original parties; and if the maker has paid part, or the whole, or if it was given for the accommodation of the payee, the holder cannot recover more than the payee could have recovered. If, however, the maker admit before the transfer that he has no defence or set-off, he will be estopped from claiming one after a transfer upon the faith thereof.

8. *Make no alteration, even of the most trivial character, in a Bill or Note, after it has passed into a state of negotiation.*

A material alteration in a Bill or Note, as in the date, or sum, or time of payment, will discharge all parties who have not consented to such alteration. Every fraudulent alteration amounts to a forgery. "To misapply a genuine signature, to sign the name

of a fictitious non-existing person, or to sign a man's own name with an intention that the signature should pass for the signature of another person of the same name, are as much forgeries as to fraudulently write the name of an existing person."

9. *Before taking a Bill or Note from the payee or indorser, take heed that the payee or indorser has a right to transfer it.*

The indorsement of a Bill or Note passes no property, unless the indorser has at the time a legal property in the Note, and consequently a right to transfer it. An infant payee or indorsee may transfer to any subsequent holder the interest of all the parties to the Note except his own; but the indorsement will not bind him personally. A Note payable to a married woman can only be properly transferred by the indorsement of the husband. One of the partners of a firm which has been dissolved during the lifetime of the partners cannot, without special authority from all, afterward indorse a Note payable to the firm, in the name of the firm. If a Note be made payable or indorsed to several persons not partners, the transfer can only be made by the joint indorsement of all of them. In case of the bankruptcy of the payee or holder, all the rights of transfer are vested in his assignees, who may, by law, transfer the same in their own names. In case of the death of the payee, his executors or administrators are vested with the sole right of transfer by indorsement. It has even been decided that where a party died, leaving a Note payable to his order and indorsed by him, and his executrix, without indorsing it, simply delivered it to the plaintiff, this act did not

constitute an indorsement of the Note, and that the plaintiff had no title to sue upon it.*

9. *Present Bills drawn at sight, or at a given time after sight, to the drawee for acceptance, at the earliest convenient opportunity; and present indorsed Notes, payable on demand, for payment within a reasonable time.*

The law does not assign a precise time within which *sight bills* must be presented for acceptance and payment; but the holder must bear the loss proceeding from a neglect of presentment for an unreasonable time. So of indorsed Notes *payable on demand*. In Massachusetts it is provided by statute, that such Notes shall be presented within *sixty days without grace*, from the date of Note, and a forbearance to demand payment for a longer period will discharge the indorser. On refusal of payment the indorser must have prompt notice as in other cases.

Lastly: *A holder should be careful that the Note is paid by the person authorized to make payment, or the money may be recovered back.*

A payment made by a married woman, without the consent of her husband, is invalid. If made by an infant, he may revoke it. So if payment be made by an agent after the death of his principal, though the fact was unknown to the agent, it is liable to be recalled as a payment by mistake; and if made by a bankrupt out of his assets, after an act of bankruptcy committed by him, it is void and of no effect, unless it is protected by some statute which imparts to it a binding force.

* *Browage v. Lloyd*, 1 Welsby, Hurlstone & Gordon, 32.

A maker is also bound to see that payment is made to the true proprietor of the Note or his authorized agent or personal representatives. It is true, that in ordinary cases the possession of a Note is sufficient to entitle the person producing it to receive payment thereof; but if the signature of the payee or other indorser has been forged, or if the Note has been indorsed specially, as "pay to A or order," and a person, falsely representing himself as A, receives payment, such payment will not discharge the maker. So payment of a Note, before it is due, is no extinguishment of the debt; and if it subsequently get into the hands of a *bona fide* holder, the latter will still be entitled to full payment from the maker at its maturity.

II. BILLS OF EXCHANGE AND DRAFTS.

BILLS OF EXCHANGE and DRAFTS are written orders or requests, for the payment of a certain sum of money to a person therein named, or to his order, or to bearer. When the order is addressed to a person residing in a foreign state or country, it is called a Bill; and when both parties reside in the same state or country, it is usually called a Draft. To insure safety, Bills of Exchange are generally drawn in sets of three—one being paid, the others to be void.

No form is prescribed in which the order or request must be drawn to entitle it to the privileges established by law in favor of Bills of Exchange; but it must be for the payment of *money only*, and for payment *absolutely and at all events*, and not upon a contingency that may or may not happen. It is,

however, advisable in all cases to adopt the most approved forms. The previous suggestions which we made respecting Promissory Notes being in general equally applicable to Bills of Exchange, we shall not repeat them, but advert to points *peculiar* to the latter.

1. *Present Bills for acceptance promptly.*

Bills payable *at sight*, or at so many days *after sight*, or *after demand*, must be presented to the drawee for acceptance; and when accepted, the drawee is called the *acceptor*, and is primarily liable for the payment. Bills drawn at so many days or months *after date* need not be presented for acceptance, only for payment; but nevertheless it is advisable to present all Bills for acceptance.

Presentment for acceptance should be made at the residence, or usual place of business of the drawee; and if he has left the country, at his house, or to his known agent; or if the drawee is dead, to his personal representatives.

2. *Demand that the acceptance shall be in writing and signed by the acceptor.*

It is true, that an acceptance may be valid though irregular in form, and even if not signed by the drawee; any expressions indicative of an intention to pay the Bill when due, being in many cases sufficient. Indeed so liberal have courts been in construing such expressions to be acceptances, that they have decided that the words "presented," "seen," or "the day of the month," written upon Bills by the drawee, *prima facie* amount to acceptances. They have held that a promise to accept a Bill already drawn upon an executed consideration, or

that "the Bill shall meet with due honor," or that the drawee will certainly pay the Bill, to be valid acceptances.

But, though a promise to accept a non-existing Bill may probably amount to an acceptance if some person be thereby influenced to take the Bill, yet it will not in any other case; and a promise by the drawee to the drawer who is not the payee, that the Bill "shall have attention," is no acceptance, unless in the course of their dealings it has usually been considered such; and there are other cases, each depending on its own peculiar circumstances, in which equivocal words have been held not to amount to an acceptance. Hence, the only general rule that can be safely given, is to demand that the acceptance shall be in writing and signed by the acceptor.

3. *Refuse to receive an acceptance varying from the absolute terms of a Bill, either in the sum, the time, the place, or the mode of payment.*

A holder will not be justified in taking any acceptance that varies from the terms of the Bill; and if he do take a qualified or special acceptance, he does so at his own risk. When an unqualified or unconditional acceptance is refused, it is his duty, if he wishes to maintain a claim against the other parties, to treat the Bill as dishonored, unless they assent to the proposed conditional acceptance.

4. *When acceptance has been refused, have the bill protested, and see that notice of the fact is promptly given to the drawer and indorsers.*

It has already been stated that, as respects Mercantile Paper, the States of this Union are as foreign

countries to each other. In some of them special laws require that a foreign Bill of Exchange shall be protested for non-acceptance and notice given: in others, protest and notice of non-acceptance are held to be unnecessary; hence, in all cases, the advice that we have given is the only safe rule to follow.*

After a Bill has been protested for non-acceptance by the drawee, or, if after acceptance, he absconds, or becomes bankrupt, a stranger may accept the Bill for the honor of some one of the parties thereto,

* "A foreign Bill of Exchange, payable so many days after sight, must be presented to the drawee for acceptance. If acceptance be refused, the law of Massachusetts, Connecticut New York, Maryland, Virginia, and the two Carolinas, require that the Bill be protested for *non-acceptance, and notice given*. The same rule was laid down by Judge Washington in this, the Third Circuit; but the Supreme Court of Pennsylvania has decided that protest and notice of non-acceptance are unnecessary. If, therefore, a merchant of Philadelphia draws a Bill on Europe in favor of one of New York, who indorses it and remits it to his foreign correspondent, and the Bill be refused, and at maturity protested for non-payment and notice given, the holder cannot recover against the New York indorser, because of want of protest, and notice of non-acceptance; but he *can* recover against the Pennsylvania drawer, notwithstanding the want of both. But this is not the worst: Suppose that the Bill is drawn in New York and indorsed in Philadelphia, the holder can recover against the Philadelphia indorser; but when that indorser resorts to the New York drawer, he cannot recover, because no protest was made and no notice given. Hence, no Philadelphia merchant is safe in indorsing a Bill drawn in any other State; as he may be compelled to pay it as indorser, and yet fail to recover it from the drawer, on account of an omission made by a third person, and which the Philadelphia merchant could not help."—*Wallace*.

which acceptance will enure to the benefit of all the parties subsequent to him for whose honor it was made, and whose name it generally specifies. If no name be designated, it is considered to be for the honor of the *drawer*. Such an acceptance is called an *acceptance supra protest*. It is a conditional undertaking to pay if the drawee do not, and the Bill must be presented for payment when it falls due notwithstanding the previous refusal of the drawee, who may possibly, in the meantime, have received assets. This presentment must, according to Mr. Chitty, be made, in cases of Bills payable *after date*, on the day on which they would fall due, according to their date; but in the case of a Bill payable *after sight*, upon the day on which it would fall due, reckoning from the acceptance for honor, and adding the three days of grace. Notice of non-payment must be given within due time to the acceptor for honor, otherwise he will be discharged. A holder however is not obliged to take an acceptance for honor.

After a foreign Bill has been protested for *non-payment*, a stranger may pay it for the honor of the drawer or a particular indorser, and he will have his remedy against the party for whose honor he paid it, and all others who are liable to him. But to be entitled to this privilege, a stranger can only pay after protest. This is technically called *payment supra protest*.

5. When a Bill is due, *the holder must exercise the same diligence in presenting it to the acceptor for payment*, and in case of his refusal to pay it, in giving notice to the drawer and indorsers that we have pre-

viously noted in our suggestions to the holders of Promissory Notes.

The Statute laws of the different States prescribe the damages which shall be paid upon Bills of Exchange, returned under protest, and the want of uniformity between those laws in this particular has been a source of considerable loss and inconvenience.*

III. SEALED INSTRUMENTS—BONDS, ASSIGNMENTS, &c.

A simple contract under seal is called in law a *specialty*—an order in the form of a Bill of Exchange,

* “The inconvenience, injustice, and loss in the damages on *protested Bills of Exchange*, is a well-known, serious, and most practical evil. They are illustrated in the decision of *Watts v. Atterbury* by our own (Penn.) Supreme Court. In that case our Court laid down the general position, that the contract of acceptance of a Bill is local, and that interest for the breach of it is to be computed at the rate of the place where it was to have been performed; and accordingly that, no matter how heavy damages a drawer in another State may be obliged to pay on account of the acceptor’s breach of contract, the acceptor is bound but for the legal interest of his own State. The plaintiffs in that case, therefore, after having been forced to pay 13 per cent. in consequence of the defendant’s breach of contract, had to content themselves with receiving from the defendant less than half the sum.

“In the above instance the advantage was in favor of Pennsylvania; while between Pennsylvania and Virginia there is not a less striking difference against us. In Virginia, when a foreign Bill is returned protested, the maker and indorsers are bound but for 10 per cent. damages. With us, as we know, the damages in such a case are 20 per cent. Large amounts of Bills drawn and indorsed in Virginia are sent to this market for sale; but if a Philadelphia merchant put his name on it, he may be made to pay 20 per cent. damages, and yet can recover from the Virginia

or a promise in the form of a Note, if it have a seal, loses its commercial character and becomes a specialty. An indorsement in blank by the payee on the back of such Bill or Note does not make him liable as the indorser of a negotiable Note. A specialty is regarded as of higher obligation than a simple contract, and ordinarily binds not only the obligor but his heirs, so that a holder of such an obligation has precedence of simple contract creditors over the assets, real and personal, of the deceased.

The *seal* is the distinguishing characteristic of a specialty, and nothing can supply its place. The common law intended by a seal an impression upon wax, wafer, or other tenacious substances; but, in

drawer or indorsers but *half* the amount. In 1837, very large amounts of foreign Bills, returned under protest, were settled by Virginia drawers or indorsers at 10 per cent., when, just before, the Pennsylvania indorsers had taken them up at twenty.

"These are but two cases out of very many. Between some of the States, there is a variation of as much as 15 per cent.

"A Bill is sometimes indorsed in two or three States. The last indorser takes it up, paying what the law of his State requires. He may then select a prior indorser, residing in a State where heavy damages are given on protested bills, and make a clear profit of from 7 to 12 per cent. The maker finally takes it up, and when he comes upon the non-paying acceptor, the 'primal eldest' cause of all the difficulty, he can recover but a half, or it may be, a third of what, on account of that acceptor's breach of contract, he (the maker,) has been obliged to pay. The effect of such a system is to check commercial intercourse, by restraining the drawing or indorsing of drafts, unless the whole subject is confined to a single State. A Natchez merchant, for example, would not draw a Bill on Pennsylvania, nor would a Philadelphia merchant indorse a Virginia drawn Bill, if either party knew to what risk he exposed himself."—*Wallace*.

most of our States, a scrawl of ink attached to the obligor's name is regarded as a sufficient seal. A seal imports consideration, and though a failure of consideration may be relieved against in equity, the obligor of a Bond, for instance, cannot defend himself from payment by pleading it was given as a gratuity. The two most important classes of specialties are Bonds and Assignments of claims for money.

1. *Before taking a Bond, observe that it binds the heirs of the obligor; that there are no interlineations in important parts unnoted; and that the penalty is sufficient to cover the loss and damage that may result from the non-performance of the condition.*

The law prescribes no particular form for a Bond, but as in other cases, it is always best to follow the most approved forms. A Bond without a condition is called a *bill-single*; but a condition is generally added, which, if fulfilled, renders the obligations void, otherwise it remains in full force. A penalty for the non-fulfillment of the condition is annexed usually in double the principal sum. It is important to note that the penalty is sufficient to cover all loss and damage that may result from non-fulfillment of the condition, for the law will not allow the obligee to recover *more* than the penalty though he may recover *less*. A case is recorded where A B was bound in a Bond to convey to C D, on payment of a certain sum of money, a deed for a lot of land. C D proceeded to erect on the premises a building of greater value than the penalty in the Bond, whereupon A B refused to convey the ground, but paid the penalty of the Bond in full. Where it is in-

tended to bind the obligor and his heirs, the term *heirs* must be named in a Bond. *Executors and Administrators* are bound, though not named. An interlineation or an erasure in an important part of a Bond, unless noted that it was made before signing and delivery, will render it void.

2. *Before taking an assignment of a Bond or other claim for money, call on the obligor and obtain from him an admission in writing, or in the presence of witnesses, that he has no defence; and immediately on the execution of the assignment, give notice of the fact to the obligor or original debtor, and preserve evidence of such notice.*

A Bond, Account, or *chose in action*, may be assigned by mere delivery of the evidence of debt for a valuable consideration, so as to vest in the assignee an equitable interest with permission to sue in the assignor's name. But an assignment, whether formal or informal, will not, as in the case of Mercantile Paper, convey to the assignee any better title than the assignor has; and if the obligor pays the original obligee before notice of the assignment, this will be a good defence to an action on the Bond; or if the obligor before notice and before the Bond becomes payable, is compelled to pay money on account of the original obligee, this will be a payment *pro tanto* on the Bond. It is therefore always prudent to give the obligor notice of the proposed assignment of his Bond, and if he fail to state that he has a defence, or admit in writing, or in the presence of a third person, that he has no defence, provided the assignee acts on the faith of such admission, he will be precluded from afterward setting it up.

In Pennsylvania, and in some of the other States, special statutes allow assignees to sue in their own name when the Bond is for payment of money and drawn to order or assigns, and the assignment is in writing under seal, and executed in the presence of two or more credible witnesses.

CHAPTER XII.

COLLECTING DEBTS.

HOW TO COLLECT DEBTS BY LAW.

HAVING procured ample and legal evidence of indebtedness, whether it be in the form of entries in an account book, or a Promissory Note, or Bill of Exchange, the next consummation devoutly to be desired is—Collection of the Debt. It is fortunate that, in general, influences more praiseworthy and powerful than apprehension of legal proceedings, induce the majority of persons to discharge their obligations, and with greater promptness than the law could enforce. In modern times it has been a favorite policy with law-makers to modify the ancient rigors of the law as respects debtors; and though the object be a laudable one, and the effect generally beneficial, it would seem that in many instances they have rendered the law, as a means for collecting debts, practically inefficient. It is unnecessary to state that, at this day, the law is powerless for the collection of what are called “bad debts,” that is, where the debtor has no visible property. In a few cases it may punish the delinquency, but it cannot convert a bad shilling into a gold dollar. Before promising to aid a creditor, the law assumes that the debt can be legally established, and that the debtor has visible means—these failing, it leaves

him to the exercise of threats, persuasion, or whatever his judgment may suggest, and more frequently to his own reflections.*

* One of the most sagacious schemes for collecting a just but extremely doubtful debt that we have heard of, is recorded of the celebrated Irish barrister—Curran. A countryman attending the assizes had deposited a £100 note with the landlord of the hotel where he was stopping, without having a witness of the fact, or taking a receipt; and when he called for his money, the landlord positively denied having received any. In his distress, the guest called upon Curran for advice, relating the circumstances. Curran told him to take another £100 note and deposit it with the landlord *in the presence of a friend*, and then return for further advice. He was loth to do so, but consented. He apologized to the landlord for the demand he had made, stated he wished to stay in his house longer, and requested the favor of depositing a £100 note with him until his departure. The landlord accepted it, and the countryman returned to Curran for further advice. "Now," said Curran, "go to the landlord without your friend, and when there are no witnesses by, demand a £100 note." He did so, and the landlord paid it. "Now take your friend with you," said Curran, "and demand the £100 note which your friend saw you deposit with him." It is needless to add that the landlord saw the trap when too late, and the countryman recovered both his notes.

Mr. Bradstreet, of Cincinnati, who has had a large experience in collecting debts, gives in his experience as follows:—

"My experience has been that I have settled four-fifths of the claims sent me to settle, by candidly meeting the debtors and treating them as men of feeling and honor, who have been unfortunately embarrassed; and unless they are dishonest, I succeed to the satisfaction of all parties. If they are dishonest, I get security—give time—take their *first* offer generally, unless they have previously failed—in that case I learn how they previously settled, and generally hold off, and come in last and get in full. With minors, who plead minority, I threaten at once to advertise their notes, &c., to be sold at public auction, before their own doors, and write the advertisement and show it to them and

It is a general rule of law, subject to some exceptions, that the law of the place where a contract is made governs its interpretation and validity; hence a contract valid in the State or place where it was made, is by comity admitted to be valid everywhere. It is also a general rule that remedies upon contracts are regulated according to the law *where the action is instituted*; hence the statute of limitations of the State in whose courts a suit is prosecuted prevails in all actions. In order, therefore, to ascertain what assistance the law will render us in the collection of debts, we are led to consider briefly the special laws of the different States of the Union respecting the subject, limiting our inquiries to those cases in which the body of the debtor may be arrested, or his property attached. In addition to arrest and attachment, however, there is a process very serviceable in many cases, especially where fraudulent assignments are suspected, known as the *Trustee or Garnishee Process*. The object is to compel a person, supposed to have goods, effects, or credits of the debtor in his possession, to appear and testify, under oath, as to the property; and if he fail to appear, he is defaulted and charged with having in his hands property of the defendant, equal to the whole debt proved against the defendant. The service of

their friends, and offer, if good security is given, to give time, or compromise. The threat almost always succeeds; if not, I put the threat in execution, and that does for all time. In short, where honesty is, I am very easy, and mild, and gentlemanly; where dishonesty is, I treat them like the devil. But a great secret of success is—promptness, perseverance, and promising to assist them if they shall do right."

the copy of the process on the trustee, fixes the property or debt in his hands as a stakeholder for the party ultimately entitled, and he cannot afterward pay over to the debtor, except at his own peril.

In MAINE, a creditor can *attach* all a debtor's goods and chattels not exempt at common law, or exempt from levy and sale on execution, and all real estate liable to be taken on execution, and hold them as security to satisfy any judgment he may obtain. He can *arrest* the debtor if he or his agent will make affidavit that the sum demanded amounts to \$10 or more, and that the debtor is about to depart and reside beyond the limits of the State with means more than is necessary for his immediate support. A homestead property, especially designated as such in a certificate filed with the register of deeds, not exceeding \$500 in value, is exempted from attachment or execution for debt.*

* In all the States certain property of a debtor is exempt from attachment and execution, and it usually consists of the necessary wearing apparel of himself and family; family beds and bedding; a stove and some fuel; Bible and school-books; a cow, a pig, and a few sheep; mechanic's tools; pew, burial lots, &c. In addition to this general exemption-law many of the States have special homestead laws, exempting from levy and execution a homestead actually used as such by the debtor or his family, and properly registered, not exceeding a certain sum in value. In Maine, New Hampshire, Vermont, Massachusetts, Iowa, Ohio, South Carolina, and Tennessee, the homestead must not exceed \$500 in value; in Georgia, \$200; Alabama, \$400; New York and Illinois, \$1000; Michigan, \$1500; Texas, \$2000; while in California the limit is extended to \$5000. In Wisconsin, a farm of 40 acres, or a town-lot of one-fourth of an acre, with dwelling house, is exempted. In Pennsylvania and

IN NEW HAMPSHIRE, a creditor may *attach* all the property, real or personal, of the debtor, and hold it as security for the judgment he may recover. He may also insert in the writ the names of as many persons as trustees as he may deem necessary, at any time before the process is served on the debtor, but not after. Every person so summoned as trustee, having in his possession any money, or goods, or credits of the debtor at the time of the service of the writ upon him, or at any time thereafter before his disclosure, shall be adjudged a trustee therefor.

The debtor, if not a female, may be arrested upon affidavit of the plaintiff made before a justice of the peace, that the defendant is justly indebted to him, in a sum exceeding \$13.83, and that he conceals his property so that no levy nor attachment can be made; or that there is good reason to believe he is about to leave the State to avoid payment of his debts.

IN VERMONT, a writ of *attachment* may issue against the property of the defendant; and debts and dues may be taken by the *trustee process*, if the demand and the amount in the hands of the trustee exceed ten dollars. No resident debtor can be *arrested un-*

Indiana the debtor has a right to select such property as he may choose, not exceeding \$300 in value; and in Delaware, \$100.

Nearly all the States have special statutes of limitation, barring or "outlawing" actions upon claims, which have been due and payable, and not sued for within a certain period. The usual limitation to actions founded upon simple contract, book accounts, Bills and Promissory Notes not under seal, is *six* years. Where a different period is affixed, it will be noted when stating the collection laws of the several States.

less the creditor files an affidavit * stating that he has good reason to believe that the debtor is about to abscond from the State, and that he has secreted money or other property. The debtor upon arrest may demand an immediate trial as to whether he is about to abscond, and if the creditor fail to prove such intention, the debtor is entitled to a discharge.

All actions founded upon contracts not under seal, must be commenced within *six years* after the cause of action has accrued, excepting upon Promissory Notes, executed in the presence of an attesting witness, and then the limitation extends to fourteen years.

In MASSACHUSETTS, *all property* except such articles as are exempt at common law, may be *attached* upon the original writ, and held as security to satisfy such judgment as the plaintiff may recover, unless dissolved by proceedings in Insolvency or by the death of the defendant. The debtor can be *arrested* if the creditor or his agent will make affidavit before some Justice of the Peace that he has a demand against the defendant "upon the cause of action stated in the writ, which the deponent believes to be justly due, and upon which he expects the plaintiff will recover ten dollars or upward; and that the deponent has reasonable cause to believe that the defendant is

* Where the Statutes of any State require that a contract or demand shall be supported by *affidavit*, and the plaintiff is not an inhabitant of the State, it may be taken and subscribed where the plaintiff resides, before a Commissioner of the State; it should specify the nature of the debt, the amount over and above all deductions and setoffs, and that the balance claimed is justly due, and the account correctly stated.

about to depart beyond the jurisdiction of the court to which the writ is returnable, and not to return until after judgment may be recovered in said suit, so that he cannot be arrested on the first execution, if any, which may issue upon such judgment." An attachment may be dissolved by payment, giving bond with sufficient sureties, or by a judicial assignment *in trust* for all the creditors.

In RHODE ISLAND, there is no exemption from arrest, except in the case of a female. By the revised laws of 1844, all original writs may be writs of arrest or of summons, at the option of the plaintiff. Whenever a writ, authorizing an arrest, is delivered to the officer, and he cannot find the defendant within the county, he may attach his goods and chattels: and if the defendant is absent from, or concealed within the State, his real estate may be attached—and in all cases of attachment on *mesne process*, the attached property shall be held to respond to the judgment, if any, recovered by the plaintiff.

In CONNECTICUT, a debtor may be arrested whenever he "shall be guilty of fraud in contracting a debt, or shall conceal, remove, withhold, assign or convey away, his estate, moneys, goods, chattels, or choses in action with intent to prevent the same from being taken by legal process, or shall refuse to pay any debt admitted by him, or established by a valid judgment, while having moneys or estate not exempt from execution, sufficient to discharge the same, concealed or withheld by him so that the same cannot be taken by legal process, or shall re-

fuse to disclose his rights of action, with intent to prevent the same from being taken by foreign attachment." Attachments may be granted against his goods and chattels, and for want thereof, against his lands, or against his person when not exempt from imprisonment on the execution of the suit. Property in the hands of a third person may be attached.

In NEW YORK, a debtor cannot be arrested unless the creditor establishes by affidavit that there is a certain amount due him, and that the debtor has been guilty of fraud. Before the order for arrest will be granted, the plaintiff must enter into an obligation in at least the sum of \$100, conditioned to pay all costs and damages if he fail to recover judgment; and if he be a non-resident of the State, he must furnish sureties.

An *attachment* may be issued for the benefit of an individual creditor against the property of foreign corporations—non-resident, concealed or absconding debtors, upon satisfactory affidavit of the creditor, his agent or attorney, filed in the office of the Clerk of the Court. This attachment will cover property of whatsoever nature, including debts due the defendant, rights or shares of stock in an association or corporation; but before the warrant will issue, security will be required from the plaintiff that if he fail to establish his claim, he will pay all costs and damages awarded the defendant. A homestead of a householder recorded as such, of the value of \$1,000, is exempt from sale on execution.

There are no "Stay Laws" in the State of New York.

IN NEW JERSEY an *attachment* may issue against the property of a debtor, wherever found within jurisdiction of the court, when a creditor shall make oath before the proper authority that he verily believes his debtor has absconded from his creditors, and is not to his knowledge a resident of the State at the time; and the writ will bind the property and estate of the defendant from the time of its execution. The property of non-residents may be attached; but such attachment enures to the benefit of all the creditors who file their claims with the auditor. There is no stay of execution in this State.

Judgments are a lien upon real estate for twenty years; but persons obtaining judgments cannot safely defer issuing executions upon such judgments. A sale under an execution, issued upon a junior judgment, gives the purchaser a clear title to the property, *free from the lien of all prior judgments*, and the proceeds of the sale are applied to the satisfaction of the execution under which the property was sold. Even New Jersey law is peculiar.

IN PENNSYLVANIA, a debtor can only be arrested upon affidavit that he is about to remove any part of his property out of the jurisdiction of the court in which suit is brought, with intent to defraud his creditors; or has disposed, or is about to dispose of his property, or to secrete it with a fraudulent intent; or has rights in action, or interest in any public or corporate stock, or evidences of money due him, which he refuses to apply to the payment of any judgment rendered against him; or when he has fraudulently contracted the debt, or incurred the

obligation in suit. A debtor may obtain his discharge by payment of the debt and costs; or by giving security to do so in sixty days, or by giving bond to take the benefit of the Insolvent laws.

Attachments are of two kinds, Foreign and Domestic. *Foreign attachment* lies only against the property of non-residents, and is limited to property sufficient to satisfy the plaintiff's claim. Before a foreign attachment will be issued, the creditors must give security to be approved of by the court with condition that if the defendant shall appear within a year and a day and pay or disprove the debt, in such case the plaintiff will restore the goods or chattels attached, to the defendant, or pay the value thereof. Legacies given and lands devised by will may be attached under this proceeding. *Domestic attachment* may be issued against the property of a debtor, being an inhabitant of the State, if he shall have absconded, remained absent from the State, or confined himself to his own house, or concealed himself elsewhere with design to defraud his creditors. After judgment is obtained, an execution may issue at any time within five years. The property that may be levied upon includes shares of stock in an incorporated company; all deposits of money in a bank, or with any individual or body politic; debts due the defendant, goods pledged or pawned, subject to the lawful claims of the bailee or pawnee; and any interest which the defendant may have in any personal or real estate. Salaries or wages of labor cannot be levied upon or attached. But a debtor who, in the opinion of the court has real estate, *clear of all incumbrances*, to the value of the judgment recovered,

is entitled to a stay of execution for six months, where the amount does not exceed \$200; for nine months if it exceed \$200 and is less than \$500; and for twelve months from the first day of the term to which the action was commenced, if it exceed \$500.

Property to the value of \$300 is exempt from levy and sale on execution

In DELAWARE, a creditor may obtain an attachment against a resident debtor upon affidavit that the defendant is justly indebted to him in the sum of \$50 or more, and has absconded with intent, as it is believed, to defraud creditors or elude process. This is called *domestic attachment*. By this writ the sheriff is required to attach all the property of the defendant; and upon its return, auditors are appointed to audit the claims of the defendant's creditors—the attaching creditor being entitled to a double share. There is another writ known as a *foreign attachment*, and which issues against a non-resident upon the oath of the plaintiff, or of some credible person for him, that the defendant resides out of the State, and is justly indebted to him in the sum of \$50 and upward.

Executions may be stayed six months upon giving security for the debt and costs.

The Statute of Limitations bars ordinary accounts after expiration of *three* years, and promissory notes and other acknowledgments of debt after the expiration of *six* years.

In MARYLAND, a creditor may attach the property, real and personal, of a non-resident, or absconding

debtor. A creditor having obtained a judgment may also sue out an attachment in the nature of an execution, and when so issued, the rights and credits and debts due the defendant may be reached. The plaintiff, however, must give bond that he will restore the goods attached or pay the value thereof, if the defendant shall appear within a year and a day and establish a good defence.

The Constitution declares, "No person shall be imprisoned for debt."

A cause may continue for three terms; so that much time may elapse before judgment can be obtained, and after judgment, a stay of execution may be had in certain cases for twelve months.

Actions upon open account, note, and simple contract, must be instituted within *three* years after the demand is due.

In VIRGINIA, imprisonment for debt does not exist. An attachment may be issued against the property of non-resident debtors having property in the State; and against resident debtors upon affidavit that the affiant believes the defendant is removing, or intends to remove his estate or property, or a material part thereof, or the proceeds, out of the State, so that execution on a judgment, when obtained, would be unavailing. A bond with sufficient security must be given before property attached can be seized and sold.

Five years is the limitation for suits upon notes and contracts not under seal.

In the DISTRICT OF COLUMBIA, a creditor, whether

a resident or non-resident, or his agent, may obtain an attachment against the real and personal estate and credits of a debtor, *whether a resident or a non-resident*, who absconds, or so secretes himself that the ordinary process of law cannot be served upon him. And if the defendant do not appear, personally or by attorney, within a year and a day, property so attached may be condemned and sold. Claims against distant debtors are frequently sued out in Washington.

Three years is the limitation for suits on notes, or contracts not under seal.

IN NORTH CAROLINA, an *attachment* may issue against the estate of a debtor wherever the same may be found, upon "complaint being made on oath to any of the judges of the Supreme or Superior Courts, or to any Justice of any of the county courts, by any person, his attorney, agent, or factor, that any person [indebted to him] hath removed or is removing out of the county privately, or so absents or conceals himself, that the ordinary process of law cannot be served on such debtor, and further swears to the amount of his debt or demand, to the best of his knowledge and belief. An attachment may also issue in favor of a resident of this State against the estate of a non-resident."

A bond is required from the plaintiff before attachment will issue.

The person of the debtor may be taken into custody upon affidavit of the plaintiff or his attorney, that he believes the defendant has not property to satisfy his judgment, that can be reached by a *fieri*

facias; or that he has *property, money, or effects*, which he fraudulently conceals; or that he is about to remove from the State.

Actions for debt are barred by the statute after the expiration of *three* years.

IN SOUTH CAROLINA, a debtor who is about to abscond before the maturity of a debt, may be held to bail. A debtor may be held to bail in any case where the debt due exceeds \$30.62 upon affidavit of the fact being annexed to the writ or process; and an *attachment* may issue against the property of a non-resident debtor, or a debtor who absconds, or who is removing out of the district, or who conceals himself so that process cannot be served upon him.

IN GEORGIA, an *attachment* may issue against the property of a debtor when he is a non-resident of the State, or when the creditor or his agent can make oath of the debt due, *or to become due*, and that the debtor is removing or about to remove out of the State or any county, or that he conceals himself, or stands in defiance of a peace-officer, so that the ordinary process of law cannot be served upon him. Actions upon open book accounts must be brought within *four* years after due; and upon notes and other written instruments, not under seal, within *six* years.

A debtor may be arrested in all cases at the commencement of a suit, if the plaintiff or his agent shall make oath that he has reason to apprehend that he may lose his claim, or a part thereof, unless the defendant is held to bail.

In ALABAMA, an *attachment* may issue against a debtor's property upon an affidavit of fraudulent acts; or that the debtor is a non-resident; or that he secretes himself; or is about to remove his property out of the State. An attachment may issue though the debt is not due, and though the plaintiff and defendant are both non-residents, if the defendant has property in the State.

A bond with surety is required from the plaintiff.

The person of the debtor can only be taken into custody upon affidavit of fraud.

In MISSISSIPPI, the property of a debtor can only be attached when a creditor "shall make complaint, on oath or affirmation, to any judge of the Supreme Court, or justice of the peace of any county, that his debtor has removed, or is about removing out of the State, or so absconds or privily conceals himself that process cannot be served on him, and further makes oath to the amount of his demand."

A bond must be given by the plaintiff to secure the payment of any costs and damages that the defendant may recover against him in the suit.

Arrest for debt, except where fraud is alleged, is abolished.

In FLORIDA, an *attachment* may issue upon an affidavit that there is a debt due, or to become due within nine months, and that the debtor "is actually removing out of the State, or resides beyond its limits, or absconds, or conceals himself, so that ordinary process cannot be served upon him; or is removing his property beyond the limits of the State,

or secreting or fraudulently disposing of the same for the purpose of avoiding the payment of his just debts."

Imprisonment for debt does not exist.

Demands against deceased debtors must be made within *two* years, and actions for simple contract debts are barred in *five* years.

In LOUISIANA, a debtor can only be arrested before judgment, upon an affidavit that he is about to leave the State *permanently* without leaving sufficient property to satisfy the judgment which the creditor expects to obtain. A creditor may obtain an *attachment* of the property of his debtor in the following cases: Where the debtor is about leaving the State permanently, without there being a possibility of obtaining or executing judgment against him previous to his departure, or when such debtor has already left the State never to return, or when such debtor resides out of the State, or when he conceals himself to avoid being cited. Property may also be attached in the hands of third persons in order to secure the payment of a debt, whether the amount be liquidated or not, provided the term of payment has arrived, and the creditor who prays for the attachment states expressly and positively the amount which he claims. The plaintiff must give a bond, with a surety for the payment of all damages which may ensue to the defendant from the attachment, if wrongfully obtained.

If a creditor know or suspect that a third person has in his possession property belonging to his debtor, or that he is indebted to such debtor, he may

make such a person a party to the suit, by having him cited to declare on oath what property belonging to the defendant he has in his possession, or in what sum he is indebted to defendant, even when the term of payment has not yet arrived.

Actions upon open account are *prescribed* within *three* years, and upon bills, notes, &c., *five* years.

In TEXAS, the judges and clerks of the district courts "and justices of the peace may issue original attachments, returnable to their respective courts, upon the party applying for the same, his agent or attorney, making an affidavit in writing, stating that the defendant is justly indebted to plaintiff, and the amount of the demand; also, that the defendant is not a resident of the State, or that he is about to remove out of the State; or that he secretes himself so that the ordinary process of law cannot be served on him; or that he is about to remove his property beyond the State, and that thereby the plaintiff will probably lose the debt; and that the attachment is not sued out for the purpose of injuring the defendant. A bond must at the same time be given, with two or more good and sufficient sureties, payable to the defendant in double the amount sworn to be due, conditioned that the plaintiff will prosecute his suit to effect, and pay such damages as shall be adjudged against him for wrongfully suing out such attachment."

Actions of debt upon instruments in writing, not under seal, must be brought within *four* years, and upon accounts, other than open accounts between merchant and merchant, within *two* years.

Claims against deceased debtors must be presented to the executors or administrators within twelve months after letters testamentary or of administration have been granted, or be postponed until all claims presented within said twelve months shall have been paid in full.

In ARKANSAS, a debtor can only be arrested in case of fraud, supported by the affidavit of the creditor, and that of some disinterested and creditable person, to the facts on which such allegation is founded.

Property may be attached on the creditor's or his agent's affidavit, made at the time of filing the declaration, stating that the defendant is justly indebted to the plaintiff in a sum specified, exceeding \$100; "and also, that the defendant is not a resident of this State, or that he is about to remove out of this State, or that he is about to remove his goods and effects out of this State, or that he so secretes himself that process cannot be served on him."

A Bond, with sufficient security, in double the amount claimed, must be first filed by the plaintiff, conditioned for the payment of such damages as may be awarded against him.

Actions upon promissory notes, and other instruments of writing, not under seal, must be commenced within *five* years, and all actions of account, assumpsit, or case, founded on contract, or liability, not in writing, within *three* years after the cause of action shall accrue.

In TENNESSEE, imprisonment for debt does not exist.

A creditor can attach a resident debtor's property where the debtor has removed out of the county privately, or is removing privately, or where he conceals himself, or his effects.

The property, debts, and other effects of non-resident debtors, being in the State, or if debts, owing by persons residing within the State, ~~may~~ be attached by any creditor, by bill in chancery, without first having obtained a judgment at law, and be held as security for the payment of the creditor's demand. In all cases of attachment the usual affidavit of the amount due, and of the knowledge or belief of the creditor that the defendant is about to do, or has done some act rendering his goods liable to attachment, must be filed; and a bond given, conditioned for the payment to the defendant for any damages he may incur by reason of a wrongful prosecution of the action.

All actions upon contracts for the payment of money, are barred in *six* years where the form of action is debt; and where the form of action is *assumpsit*, in *three* years.

In KENTUCKY, a debtor may be arrested upon affidavit filed in the office of the clerk of the court in which the action is brought, showing the nature of the plaintiff's claim, that it is just, its amount, and that the affiant believes that the defendant is about to depart from the State, with intent to defraud his creditors; or that he has concealed or removed his property, or so much thereof, that the process of the court after judgment cannot be executed, or that the defendant has money or securities

for money, or evidences of debt in his own possession, or in that of others for his use, and is about to depart from the State without leaving property therein sufficient to satisfy the plaintiff's claim.

The plaintiff must give security to pay the defendant's damages, if the order be wrongfully obtained.

An *attachment* against the property of the defendant, may issue:—First, in an action upon contract for the recovery of money, where the action is against a defendant, or several defendants, who, or some one of whom, is a foreign corporation, or a non-resident of the State; or who has been absent therefrom four months; or has departed from the State with intent to defraud his creditors; or who has left the county of his residence to avoid service of a summons, or who so conceals himself that a summons cannot be served upon him; or who is about to remove his property, or a material part thereof, from the State, not leaving enough to satisfy the plaintiff's claims; or has disposed of his property, or is about to do so, with intent to defraud his creditors. Second, in an action to recover the possession of personal property, where it has been ordered to be delivered to the plaintiff; and when the property, or a part thereof, has been disposed of, or concealed, or removed, so that the order for its delivery cannot be executed by the sheriff.

Actions upon Promissory Notes and the like, and upon accounts between merchant and merchant, must be brought within *five* years, and upon store accounts within *one* year.

In OHIO, a debtor cannot be arrested except upon affidavit establishing fraud, as that he has fraudulently

contracted the debt, or removed, or begun to remove his property from the county, or concealed his property, or begun to convert it into money with intent to defraud his creditors. A debtor's property may be *attached* upon the affidavit of the creditor, his agent or attorney, showing the nature of his claim, that it is just, the amount he believes he ought to recover, and establishing one or more of the following particulars, viz: 1. that the defendant is a foreign corporation, or a non-resident of the county. 2. He has absconded with intent to defraud his creditors. 3. Has left the county to avoid service of a summons. 4. Conceals himself. 5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with intent to defraud his creditors. 6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors. 7. Has property, or rights in action, which he conceals. 8. Has assigned, removed, or disposed of, or is about to assign, remove or dispose of his property, or a part thereof, with intent to defraud his creditors. 9. Fraudulently contracted the debt or incurred the obligation for which suit is about to be, or has been, brought.

Before attachment is issued, a bond with security is required from the plaintiff. The property attached, or the proceeds thereof, enures to the benefit of the attaching creditor, to the extent of his claim.

In MICHIGAN, the property of a debtor may be attached upon affidavit, showing to the satisfaction of the court, either that the defendant is a non-resident, or that he has absconded; or that he fraudulently

contracted the debt; or that he is about to remove his property from the county in which application is made, or where he resides, with intent to defraud his creditors; or that he has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal any of his property with like intent.

Imprisonment for debt, except in cases of fraud, is abolished.

In INDIANA, a debtor may be arrested or held to special bail when the creditor, his agent or attorney, shall make and file with the Clerk of the Court where suit is instituted, an affidavit, specifying the plaintiff's right to recover an existing debt or damages from the defendant, and also stating that he believes the defendant is about to leave the State, taking with him property subject to execution, or money, or effects, which should be applied to the payment of the plaintiff's debt or damages, with intent to defraud the plaintiff.

A resident debtor's property may be attached whenever the debtor may be secretly leaving, or shall have left the State, with intent to defraud his creditors, or to avoid the service of a civil process; or shall keep himself concealed, so that process cannot be served upon him, with intent to delay or defraud his creditors; or when the defendant has disposed of, or is about to remove his property, for the purpose of delaying or defrauding his creditors. No writ of attachment shall issue against any absent debtor, while his wife and family remain settled in the county where his usual place of residence may have been, unless he continue absent from the State

more than one year, except an attempt be made to conceal his absence, or unless the debtor be secretly removing his property to avoid the payment of his debts. If the wife or family of the debtor refuse, or are unable to account for his absence, or to tell where he may be found, or shall give a false account, such refusal, or false account, shall be construed an attempt to conceal his absence.

A debtor giving security, may obtain a stay of execution upon a judgment exceeding \$100, for one hundred and eighty days.

In ILLINOIS, a debtor can only be arrested when he refuses to surrender his property for the satisfaction of any execution issued against it, or when there is a strong presumption of fraud. A creditor can obtain a writ of *attachment* only when he or his agent shall file an affidavit of the indebtedness, and that the debtor has departed, or is about to depart from the State, with the intention of having his effects removed from the State; or is about to remove his property from the State to the injury of such creditor; or that he conceals himself, or stands in defiance of an officer, so that process cannot be served upon him; or that he is a non-resident. Bonds of indemnity are required before a writ of attachment can be had.

Actions for the recovery of money must be commenced, within *five* years after the cause of action shall have accrued.

In MISSOURI, imprisonment for debt is abolished. An *attachment* may issue when the debtor is a non-resident; when he conceals himself or absconds, so

that process cannot be served upon him; when he is about to remove his property out of the State, or has disposed or is about disposing of it, or has concealed or is about to conceal it, with intent to defraud; or when the debt was contracted out of the State, and the debtor has absconded, or removed his property into the State, with intent to defraud, hinder, or delay his creditors. In all these cases, excepting *the first two*, attachment may issue, though the debt be not yet due.

Before attachment can issue, affidavit must be made by the plaintiff that the defendant is justly indebted to the plaintiff in the sum claimed after allowing offsets, stating on what account the debt was contracted, and that affiant believes, and has good reason to believe, the existence of one or more of the particulars which entitle him to an attachment. If the defendant put in issue the truth of the affidavit, the plaintiff must prove the facts therein alleged, and must give a bond, with one or more sureties, resident householders of the county in which the action is brought, in a sum double the amount of the claim sworn to, for the payment of any damages which may ensue from a wrongful attachment.

Non-residents wishing to sue their debtors in this State by attachment, should send with the demand an affidavit setting forth the necessary facts, and should provide the requisite security.

Actions must be commenced within *ten* years upon any writing, whether sealed or unsealed, for the direct payment of money or property; and within

five years upon any other contract, obligation, or liability, express or implied.

In IOWA, when any action founded on contract is commenced, or is about to be commenced, a writ of *attachment* may be issued by the Clerk of the District Court, upon an affidavit that something is due the plaintiff from the defendant; that affiant believes the defendant is a non-resident, or that he is about to dispose of or remove his property out of the State, with intent to defraud his creditors; or that he has absconded, or is about to abscond, so that ordinary process cannot be served upon him; or that he has property, or goods, or money, not exempt from execution, which he refuses to give in payment, or security of the demand. Such writ may be levied upon any lands, tenements, goods, chattels, rights, credits, moneys, or effects of said debtor, which may be found in any county, or so much thereof as may be sufficient to pay the debt, together with interests and costs of suit. A Bond with approved sureties is required from the plaintiff.

The person of a debtor cannot be taken into execution upon any civil contract, unless in case of fraud.

Actions founded upon *unwritten* contracts must be brought within *five* years, and upon *written* contracts within *ten* years.

In WISCONSIN, no person can be imprisoned in any case arising upon contract.

Attachments are allowed by the Circuit Court against the property of a debtor when the plaintiff, or some one in his behalf, shall make an

affidavit stating that the defendant is indebted to the plaintiff in a specified sum, above offsets, exceeding \$100, and that the same is due on contract, judgment, or decree, and stating that the deponent knows, or has good reason to believe, either that the defendant has absconded, or is about to abscond from the State, or that he is concealed therein to the injury of his creditors; or that the defendant has disposed of, or concealed, or is about to dispose of, or conceal some of his property, with intent to defraud his creditors; or that the defendant has removed, or is about to remove, some of his property from the State with a like intent; or that he fraudulently contracted the debt; or that he is a non-resident; or that the defendant is a foreign corporation.

In CALIFORNIA, the Constitution provides that no person shall be imprisoned for debt in any civil action on mesne or final process, unless in case of fraud.

The personal and real property of a debtor may be attached for an obligation founded upon a contract for the direct payment of money in this State, whether the contract be made in California or elsewhere, if not secured on real or personal property.

The writ of attachment will be issued upon the plaintiff's affidavit, or that of some person in his behalf, "that he has a good cause of action, and filing the same with the clerk of the court, together with an undertaking, with two or more sureties, in a sum not less than \$200, nor more than the amount claimed by the plaintiff, to the effect that if the defendant recover judgment, the plaintiff will pay all costs awarded, and all damages sustained by a wrongful

attachment, not exceeding the sum named in the undertaking. After the attachment is issued the sheriff is bound to execute it, unless the defendant give bonds with two or more sureties for the payment of the demand and costs, should the plaintiff recover judgment. 'At any time before judgment, the defendant may give the undertaking to the clerk after reasonable notice to the plaintiff, and upon doing this, the property attached and not sold, will be delivered up by the sheriff, together with the proceeds of any sale already made. The sureties given by defendant or plaintiff must be worth double the amount named in the bond, and residents of the State, and householders or freeholders. In the matter of attachment, it makes no difference if the debtor, or the person to whom the debt is due, be a citizen or foreigner, but the demand must grow out of a California contract.'

All property exempt from execution, is also exempt from attachment.

The *Homestead Exemption* law, exempts from attachment and execution, a quantity of land with buildings, not exceeding in value \$5000, which the owner may select.

It will thus be seen that the remedies for the collection of debts, excepting in the States where attachment on *mesne process*, as in New England, is allowed, are not of a very efficient character. In ordinary cases, where neither fraud, nor circumstances evincing a fraudulent intent can be alleged, the creditor is left to the usual remedy of obtaining judgment and issuing execution upon such property

of the debtor as can be found, not exempt from sale. As this proceeding requires professional assistance, the only and important service that we can render the creditor, will be to furnish him a list of diligent and reliable Attorneys, from which he may select those into whose hands he may safely entrust his interests and his claims. This we will endeavor to do in the Appendix.

Now, a word to debtors:

1. *When you admit a debt to be due, but have an offset against the claim which does not equal the demand, tender the balance; and where a part only of a claim is disputed, tender the part admitted.*

One demand may be set off against another whenever it is *founded upon judgment or contract*—is for a sum certain, or that may be ascertained by calculation,—and exists between the parties *at the commencement of the suit and in their own right*. A claim against a man as administrator cannot be offset against a debt due him in his own right. Whenever a person has a claim against a party suing him, which he cannot avail himself of by way of offset, he should immediately commence suit on his claim, and with the permission of the court, offset one judgment against the other.

Whenever a *certain part of a claim* is admitted to be just and due, the debtor should tender the amount admitted, in gold or silver, or bank notes,* to the creditor or his attorney, in the pres-

* Bank notes are a good tender, *unless expressly objected to on that account.*

ence of a witness, and if the court decide that the disputed portion shall not be paid, the debtor will be relieved from costs. Care, however, must be taken to *express distinctly the grounds of the tender, limiting it to the unobjectionable part of the claim, and to make the tender without any qualification or conditions.* A tender for more than the amount that is due is believed to be good for what is actually due; but it is advisable to tender the exact amount.

2. When you admit the amount of a demand, but claim that the *period of credit has not elapsed, you must prove it*—hence it is always advisable, as we before stated, in open accounts, to *have the time of credit expressed in the Contract of Sale, or Bill of Parcels.*

3. Lastly, do not *plead the statute of limitations in bar to actions upon bona fide debts, but pay them without cavil or delay.*

The Statute of Limitations was originally adopted for a beneficent purpose. It was designed to make creditors diligent in enforcing their claims, and to prevent the multiplication of suits, in cases where the evidence of indebtedness, or defence had been destroyed through the lapse of time, or by the death of parties. No one can therefore plead the Statute in bar to a claim that he knows to be just, without perverting its original design, and what is worse, injuring his own conscience, and weakening the bonds of mercantile confidence and integrity.

CHAPTER XIII.

FAILURES AND ASSIGNMENTS.

HINTS FOR DEBTORS AND CREDITORS.

A DEBTOR, whose creditors are resorting to the means for collecting debts treated of in the preceding chapter, may very naturally regard his affairs as in a highly critical position. A creditor, who cannot collect the debt due him except by a resort to such means, may very reasonably consider the case as a doubtful one; and if he has "tears to shed," he may prepare to shed them now. In ancient warfare, it was observed that Irishmen, who had good cimeters, would rather have had blows on their arms than their weapons injured: and at the present day, it is not difficult to find individuals, not Irishmen, who would apparently rather suffer in person, than in their property. Losses, however, are among the offences that must needs come; and in the United States especially, where a gigantic business is often transacted upon a limited capital, but few at least of those who pursue fortune by selling goods on credit, escape the necessity of learning something of those commercial pitfalls distinguished by the euphonious names of Insolvency, Assignments, and Bankruptcy.

To mercantile men, no dissertation or treatise
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would possess greater value than a universal and infallible guide for detecting in time the symptoms of coming insolvency. Unfortunately, in some instances, insolvency comes like the whirlwind, unforeseen by all; in other, and in the majority of cases, the symptoms, though well defined and certain, are not brought within the cognizance of creditors, until the embarrassment has become extreme, and the period for escaping losses has passed by. Ordinarily, a debtor, whose means are on the wane, resorts to expedients which prolong as well as indicate the struggle, but which rarely avert the dreaded result. The following are among the most common:—He first seeks pecuniary assistance from relatives, or personal friends; and when this source is exhausted, as it soon will be, he obtains from, or exchanges with, his acquaintances, or neighbors in business, accommodation notes—which he disposes of “on the street,” on terms to suit purchasers. When these notes approach maturity, his next expedient to raise money, generally is, to purchase on credit more goods than his ordinary transactions require, and pledge them for advances, or dispose of them by forced sales at auction. By and by, one or two acceptances are allowed to be protested, for which, however, very plausible pretexts are offered. But the “accident” becomes chronic; and the debtor passes from the hands of the brokers into the hands of the lawyers. Legal proceedings being commenced against him, he, as a last resort, seeks to postpone judgment and gain time for “something to turn up,” by the interposition of fictitious defences. It is unnecessary to say, that all these expedients are as expensive as a

"fast wife," and a "2.40 horse"—not seldom the original causes of the embarrassment—and as a means of avoiding bankruptcy, quite as unavailing. Judgments impend, executions threaten, and then the debtor either assigns his property for the benefit of his creditors, or suffers the law to take its course; and then the creditors discover, to their astonishment, that the property to which they had trusted, has been absorbed in ineffectual attempts to escape a public avowal of insolvency.

In the United States, as is known, there is no general bankrupt law, the last having been repealed in 1843, but insolvent debtors are allowed to make a bankrupt law for themselves by transferring their property directly to their creditors, or as is more common, to one or more persons in trust for the benefit of their creditors. This transfer is called a *voluntary assignment*; and the same name is also given to the *instrument* by which it is effected. Sometimes, though rarely, a debtor transfers only a portion of his property in trust for his creditors, and this is called a *partial assignment*. The transfer by firms of the partnership effects, retaining the separate property of the individual partners, are instances of partial assignments. The transfer of specific property directly to creditors, either as payment or security, is usually effected by way of *sale or mortgage*.

In the absence of a general bankrupt act, it has been the policy of our law to sanction *bona fide* voluntary Assignments. In all the States, with the exception of Vermont, in which partial assignments are allowed; and of Louisiana, where assignments

are in general superceded, insolvent debtors are permitted to assign all their property *in trust* for the benefit of their creditors; but as the privilege is one liable to abuse, legislatures and courts have deemed it necessary to impose checks and restrictions upon such general Assignments. Some of the States merely prohibit preferences to any creditors: others compel a conveyance of all the debtor's property under the obligation of an oath: and others require assignees to give security for the faithful execution of the trust. To guard against fraudulent Assignments, nearly all the States have re-enacted, in substance or *in toto*, the statute of 13 Elizabeth, c. 5, which declares, substantially, that all conveyances or assignments of property, contrived of *malice and guile*, and made with "*the intent to hinder, delay or defraud creditors,*" or other persons, in the prosecution of their lawful claims, shall be void as against the person so hindered, delayed, or defrauded. The necessary *effect* of any assignment, is to hinder or delay some one or more creditors in the prosecution of their claims; for assignments are rarely made until some creditors are pressing; but the question under this statute is not as to the general effect, but the manifest intent of the assignor. A creditor who seeks to assail an Assignment on the ground of hindrance or delay, or on the ground of fraud, must be prepared to prove an actual want of good faith on the part of the assignor, or such a combination of suspicious circumstances, as will justify a court or jury in inferring fraud.

When a general Assignment has been made by a debtor, the question submitted for the considera-

tion of creditors is, whether they shall accept its provisions, or attempt to overturn it as fraudulent or illegal. This election must be made before they become parties to the assignment, and generally before they receive any benefit under it; for afterward a plea of ignorance of its provisions will not avail them. In some cases, Assignments are so drawn as to be executed by creditors, and these generally *contain a provision for the release of the debtor*. If, upon due examination, a creditor concludes to accept the provisions of an assignment, he must "come in," as it is termed, in the mode, and within the time designated in the instrument, or where neither mode nor time has been expressed, by giving notice to the assignee of his assent, or by presenting his claims for payment or dividend. If, however, a creditor sees proper to *repudiate* an Assignment, he may either treat it as a nullity where fraud is apparent on the face, or illegality obvious, and proceed to levy upon, or attach the property as if no assignment had been made; or in cases where illegality is less obvious, he may proceed by a bill in equity to have the assignment declared void, and set aside judicially. But it must be understood that those creditors only who have obtained judgments which are a lien upon the property, have the right to file a bill to set aside a debtor's conveyance. The subject, then, so far as of value to non-professional readers, may, perhaps, be exhausted in treating of two considerations. 1. *What circumstances may justify a creditor in proceeding to assail an Assignment:* and secondly—*How a debtor may make an Assignment which cannot be assailed.*

1. CIRCUMSTANCES INVALIDATING ASSIGNMENTS.

Before proceeding to state the circumstances, the existence of any one of which may justify a creditor in confidently attempting to assail an Assignment, it may be well to caution him to remember that "the right to make a general assignment of all a man's property," in the language of C. J. Marshall, "results from that absolute ownership which every man claims over that which is his own." When, therefore, the conduct of the debtor is unobjectionable, and the Assignment, apparently intended to convey all his property for the benefit of all his creditors, equally and rateably, the law will not only sustain, but justify and approve it. It is also well to bear in mind that, though fraud will invalidate an Assignment, the proof of fraud rests upon the party making the charge, and it must be clearly established. But, nevertheless, where the Assignment contains clauses or provisions which have been adjudged fraudulent, or where the conduct of the debtor, if not satisfactorily explained, is extremely suspicious, Courts will not hesitate to set an assignment aside, on application by vigilant creditors.

1. An Assignment which *shows on its face that it was made for the use of the assignor*, in whole or in part, is fraudulent and void. And any clause or provision in an Assignment which *reserves any benefit or advantage to the debtor* at the expense of creditors, either for himself, or for the support of his family, either temporarily or permanently, will, in general, invalidate the whole Assignment.

2. A clause, reserving to the assignor *any power over the provisions of the instrument, or over the property assigned by it, or the appropriation of the proceeds*, is fatal to the Assignment. An Assignment to be valid must be an absolute and *bona fide* conveyance of property in trust for the benefit of creditors, and not for the benefit of the debtor. Hence, clauses reserving a power to the debtor to appoint new assignees, or to change the order of preferences, or to direct the terms, mode or place of sale of the assigned property, or to appropriate the proceeds, or a direction to the assignee to hold them "subject to the future order of the assignor," are generally fatal to the validity of an Assignment containing them.

3. A provision, *giving the assignees discretionary power* to pay off certain debts *in preference* to other debts provided for in the Assignment, has avoided assignments as tending to injure, delay, and hinder creditors in the collection of their just debts. When preferences are allowed at all, the debtor must declare such preferences *in the Assignment at the time of executing it*.

4. *Preferences* given to certain creditors in assignments, or *directions to assignees* to pay creditors *in a certain prescribed order*, should always be closely examined by the light of statute law. A debtor may, voluntarily, secure particular creditors by the transfer of specific property, or by pledging property, or by confessing judgment; and when done fairly, and *not in immediate connection with an Assignment*—such preferences will be protected. But in New Hampshire, Connecticut, Delaware, and Georgia, Assignments giving preferences are declared fraudulent

and void. In New Jersey the *preferences*, excepting to mortgage and judgment creditors, (where the judgment has not been obtained by confession,) are deemed fraudulent and void. In Maine, Massachusetts, Pennsylvania (excepting for wages, not exceeding \$50,) Ohio and Missouri, such preferences in Assignments are invalid, and the assignments are held to enure to the benefit of all the creditors in proportion to their respective demands. In the other States, preferences to creditors in general Assignments, have not yet been prohibited by statute, but they are regarded by the courts with disfavor.

In Maine, Massachusetts, Vermont, Rhode Island, New York, New Jersey, Pennsylvania, Ohio, Indiana, Virginia, South Carolina, Alabama, preferences to creditors are denied to *limited partnerships*, and in many of the States render such assignments void.

5. Preferring a *fictitious* debt, as giving a judgment *without consideration*, and preferring that judgment in an Assignment, will, if proved, render the Assignment void.

6. Assignments containing clauses, directing that the *proceeds of the property* shall be used in defending all suits which may be brought by creditors to recover their debts, and clauses *expressly debarring those creditors who should sue*, from any benefit by the distribution, have been declared void, as tending to "delay and hinder" creditors in the prosecution of their claims.

7. A direction to assignees to sell the assigned property *at retail or on credit*, may invalidate an assignment. In most of the States an assignee, in

the absence of any express direction, has the option to sell at public or private sale, for cash, or credit, as he may deem most for the interest of all the parties; but *an express direction by the assignor*, to sell "on credit," has been regarded as manifesting an intention to "hinder and delay" creditors.

8. A provision, guaranteeing the assignee an *unreasonable compensation* for his services, has, in several instances, avoided assignments. In some of our States, there are statutes regulating the compensation of assignees.

9. The selection of *incompetent, or improper persons as assignees*, will have the effect of rendering the Assignment void. The books record many cases where debtors have selected for assignees, blind persons, relatives afflicted with incurable diseases, persons known to the assignor to be insolvent, members of the assignor's family of *doubtful competency*, and such appointments have been considered by Courts as evincing an intention, on the part of the assignor, to keep the control of the property in his own hands, and thereby to commit a fraud.

10. The debtor's *retaining possession of personal property*, after it has been assigned, is, as a general rule, unless satisfactorily explained, evidence of a fraudulent intent. The assignee may appoint the assignor as his agent to manage the assigned property, and give him a compensation therefor; but the appointment must be a *bona fide*, not a nominal agency—the assignee being always held responsible for his acts, in same manner, and to the same extent as for the acts of any other agent.

But in the Southern States, where *deeds of trust*,

which partake largely of the character of mortgages, are the Assignments in general use, the retention of possession by the debtor raises no presumption of fraud ; and in Pennsylvania, the *record of the Assignment*, and a compliance with other statutory provisions, have been held to dispense with the necessity of a delivery.

11. The conveyance of a much larger amount of property for the benefit of *particular* creditors, than may reasonably be supposed necessary to satisfy their claims, is not necessarily fatal to an Assignment, but if unexplained, it is a circumstance from which fraud may be inferred. "It furnishes no conclusive argument of a dishonest purpose," say the Court, in *Burgin v. Burgin*, 1 Ir. 453, "if the deed conveys property of value fully to cover the debts, under any and all contingencies that may be expected or reasonably apprehended. But it is equally true that, under pretense of securing a debt, the debtor may convey much more than is necessary for that purpose, and really for securing the use to himself, and baffling his other creditors." The question is one of intention.

12. The last circumstance that we shall mention that may invalidate an Assignment, is *neglect of some statute formality, as recording or registering*. In *Pennsylvania*, the statute of March 24, 1818, requires Assignments to be recorded in the county where the debtor resides, within *thirty* days after its execution, or to be void against creditors. In *North Carolina*, a deed of trust must be proved and registered within *six months*; in *Alabama*, of personal property within *thirty days*, and of real estate within

sixty days. *Connecticut, Massachusetts, New Jersey, Virginia, Kentucky, Maryland, and Mississippi,* have statutes requiring Assignments to be registered, but some of them limit no time within which the registry must be made. In *New York and South Carolina*, recording is not essential to the validity of an Assignment.

In addition to the above, the following points occur to us as deserving consideration by creditors before they elect to accept or reject assignments.

1. When the Assignment contains a stipulation *for the release of a debtor as a condition of receiving any benefit from the deed*, the opinion of an able counselor should be obtained as to its effect. In some of the States, Pennsylvania and Virginia for instance, Assignments with stipulations for a release of the debtor, have been sustained to the extent of excluding non-releasing creditors; in others, they have been adjudged valid only so far as they operate to postpone non-releasing creditors to others; while in other States, they have been pronounced void under all circumstances. The tendency of modern decisions is against the validity of such stipulations, as being indirectly a benefit to the debtor, and tending directly to delay and hinder his creditors, but the law on the subject is by no means uniform throughout the United States.

2. Where conditions are prescribed in an Assignment, as for instance, a stipulation for the release of the debtor, *observe whether there is any time fixed within which the conditions are to be executed; and secondly, whether it is a reasonable time.* When no time, or an unreasonable time is prescribed, the

deed will probably be considered fraudulent, (2 *Kent*. 533). The reasonableness of the period of limitation will depend on circumstances. Six months, within which creditors must execute releases, was held in one instance not to be an unreasonable time; but ninety days is the common period. A similar rule prevails with regard to stipulations for executing the trust, and for the sale of the property assigned.

3. When the assignment has been made by a firm, observe whether the assignment conveys the *individual property of the partners as well as the partnership effects*. If it do not, it is a *partial* assignment only, and the law with respect to partial assignments differs from that governing general assignments. For instance, a stipulation for the release of the debtor as a condition of receiving benefit, is sustained in Pennsylvania in general assignments, but the same stipulation in a partial assignment would be regarded as fraudulent.

4. Where the Assignment describes property by reference to a schedule, as "all and singular the estate and effects contained in a schedule annexed, marked A," *examine whether the schedule contains ALL the property of the debtor*. Such a description conveys to the assignee only the property contained in the schedule, and the balance is subject to a creditor's attachment or levy.

5. Where the assignor has real estate situate in different States, *ascertain whether the Assignment has been made in conformity with the statute laws of the respective States*. It is a general rule of law, that the title to real estate can only be conveyed in the mode prescribed by the laws of the State in which

the land is situated, and consequently an Assignment, however valid in the State where the debtor resides, will not pass to the assignee the legal title to lands situate in other States, unless made in conformity with their laws.

II.—HOW TO MAKE A VALID ASSIGNMENT.

An assignment is a deed, and should partake of the form of deed; but in the absence of any statute regulations, the law prescribes no unvarying form, nor does it in all cases require an Assignment to be in writing. But an informal Assignment would necessarily be subject to suspicion, and one not evidenced by writing, and the assignor's signature, would in most cases be of doubtful validity.

The simplest form of an Assignment is a deed conveying the *whole* of the debtor's property unconditionally, to one or more persons with authority to receive, hold, and dispose of it for the benefit of all the debtor's creditors, without distinction or preference.—A schedule should be annexed, containing a list of the debtor's property and his liabilities, as accurate as possible. Such an Assignment a debtor can make without professional aid; but where it is important to introduce *special clauses* of any description, the advice of an able counselor should be obtained. Special clauses in Assignments even of an ordinary character are "narrowly scanned and closely watched" by Courts, and those "which are unusual," says Gaston, J., "ought on that account alone to excite suspicion." "So many instances," says Burrill, "have lately occurred of Assignments being declared fraudulent and void on account of a single provision, supposed by the draughtsman to be at least of a

harmless character, that the drawing of a valid assignment has come to be regarded by some as a matter of no small difficulty and hazard."

An Assignment should be made before the liens of creditors have actually attached. Assignments may be made after as well as before a verdict, and during the pendency of judgments, but in order to be effectual, they must generally be made before the creditor's liens have *actually attached* in the form of judgment, execution, creditor's bill, or attachment.

Before appointing a person as assignee, it will be well to be assured of his acceptance of the trust, as his refusal to act after the execution and delivery of the instrument, may seriously impair its effect and operation. A debtor cannot reserve to himself the right to name a successor of the assignee in case the latter should resign the trust.

An Assignment conveying real estate must be under seal, and the schedule should be dated and executed with the same formality as the Assignment. An Assignment may be executed by attorney, under a proper power for that purpose, and one partner, with the concurrence or by the authority of the other partners, may execute an Assignment in behalf of a firm.

Finally, debtors who compromise with creditors, by paying a part of the indebtedness, expecting an acquittance of the whole, should require a release under seal of all demands. A mere receipt, though the words, "in full of all demands" be expressed, will not preclude the creditor from claiming the balance at a future time, for beyond the sum actually paid, the receipt will be without consideration to support it, and consequently of no legal effect.

CHAPTER XIV.

PAYING DEBTS.

BANK NOTES—COUNTERFEIT NOTES—CHECKS, &c.

THE payment of a Note, Bill, Bond, or Account, is ordinarily its finality. Payment, like charity, is twice blessed : it blesses him that pays and him that receives. With a transaction so agreeable to the persons interested, and so indicative of a disposition to deal fairly and to do justice, the law is rarely called upon to interfere, and consequently the law books have but little to say in respect to the subject of paying debts. But it sometimes happens, that money is paid to a person other than the creditor, and he misapplies it; and more frequently it happens that payment is made in articles which are accepted by the creditor as valuable, but which prove valueless; and in these and other cases, the question arises for legal determination,—Is the debt satisfied? or, in other words, *What is a good payment?*

I. A payment is good when *made to the person entitled to receive it*; and consequently a payment to the creditor himself is necessarily good. So, if made to an agent or attorney, whose authority has not been revoked. A payment is also good if made to a person *sitting in the counting room of the creditor*, with accounts books near him, and apparently entrusted with the conduct of the business; but not if made to an *apprentice*, not in the usual course

of business, but on a *collateral transaction*. Payment is also good, if made to *one* of several partners, trustees, or executors; and if the debtor has made himself absolutely liable to a third person by the acceptance of the creditor's *order* drawn on him, this, as against the creditor, is a good payment of his claim to that amount, even though the creditor has subsequently countermanded the order.

II. A payment made to the proper person in "*lawful money of the United States*" is indisputably good, and ordinarily a payment in the notes of banks in good credit, is considered as equivalent to a payment in gold or silver. But a payment made in *counterfeit coin or notes*, is no payment, if the receiver give notice to the payer within a reasonable time that the coin or notes are counterfeit. (2 *John*. 455.) Suppose, however, as frequently it happens, that a payment is made in *the genuine notes of a bank which at the time of payment has actually failed, or does fail before the receiver has reasonable time to present them for redemption, will such payment bar a recovery on the original debt?*

It is well settled that a payment in bills, after the bank issuing them has stopped payment, *if the fact was known or suspected by the payer*, is no payment, for it would amount to a fraud. But where both parties are innocent, there is some conflict in the authorities as to whether the loss must be borne by the transferer or the transferee. In *Pennsylvania*, in *Bayard v. Shunk*, 1 W. & S., 92, it was held that payment in bank bills after the bank has failed, but the fact is unknown to both the payer and receiver, is a good payment, and the loss is to be borne by

the receiver. In Massachusetts, in *Young v. Adams*, 6 Mass. 185, the Court said, "the responsibility of a bank, when the bills paid are true and genuine, is, we believe, the risk of the receiver." The same doctrine has been held in Alabama. But Story, in his work on *Promissory Notes*, (§ 501-2,) has reviewed the authorities, and come to a different conclusion. He says: "In respect to persons who receive the same (bank notes) in the course of circulation, either in payment of prior debts, or of debts then contracted, the general rule is that the creditor takes them at his own risk if the bank is then in good credit, and he does not present the same for payment within a reasonable time, that is to say, as early as he may after the day on which he has received the same. If the bank has actually failed, or should fail before the notes can, within such reasonable time, be presented for payment, then the holder, upon giving due notice of the dishonor, may recover the amount or consideration from the person from whom he received the same. But it has been thought that even the failure of the bank will not dispense with a due presentment for payment at the banking-house; and at all events, it will be necessary to give due notice to the person from whom the notes were received of the failure of the bank, accompanied with an offer to return the notes in order to bind him. We have already had occasion to state that there is some conflict in the American authorities upon the point, whether bank notes are to be deemed an absolute payment, and taken at the risk of the creditor who receives the same, or not.

What has been stated in the preceding part of this section is the doctrine asserted in the English authorities ; and it seems supported by what may well be deemed the preponderance of authority, as well as of reasoning, in America."

III. A payment in the *debtor's own check, or the check of a third person*, which is duly paid on presentation by the bank on which it is drawn, is, of course, a good payment. But suppose that the bank refuses to honor such check, is the original debt nevertheless discharged? "The general rule of our law," says Greenleaf, in his work on Evidence, "is, that if the creditor receives the debtor's check for the amount, it is payment, *if expressly accepted as such*, unless it was drawn colorably, or fraudulently, and knowingly without effects. But in the absence of any evidence of an agreement to receive a check or draft as payment, it is regarded only as the means whereby the creditor may obtain payment, or as payment provisionally until it has been presented and refused ; if it is dishonored, it is no payment of the debt for which it was drawn." But it is also a rule of law that the receiver or holder, in order to charge the drawer, must show that he has used due diligence to obtain the money, and that it cannot be obtained ; and, if a loss accrue through his negligence, it must be borne by himself. This leads to the inquiry what is *due diligence, in the contemplation of law, in collecting a check* ?

"The general rule is," says Story, in his Treatise on Promissory Notes, § 493, "that the holder, in order to charge the drawer in case of dishonor, is bound to present the same for payment within a

reasonable time, and to give notice thereof to the drawer within a like reasonable time, otherwise the delay is at his own peril. What is a reasonable time will depend upon circumstances, and will in many cases depend upon the time, the mode, and the place of receiving the check, and upon the relations of the parties between whom the question arises. If the payee, or other holder of the check, receives it immediately from the drawer in the same town or city where it is payable, he is bound to present it for payment to the bank, or bankers, *at furthest, on the next succeeding secular day after it is received, before the close of the usual banking hours.* Where he receives the check from the drawer in a place distant from the place of payment, it will be sufficient for him to forward it by the post to some person at the latter place, on the next secular day after it is received; and the person to whom it is thus forwarded, will not be bound to present it for payment until the day after it has reached him by the course of the post. If payment is not thus regularly demanded, and the bank or bankers should fail before the check is presented, the loss will be the loss of the holder, who will have made the check his own, and at his sole risk, by his *laches*. The reason of this strictness is said to be that a check, unlike a Bill of Exchange, is designed for immediate payment, and *not for circulation*; and therefore it becomes the duty of the holder to present it for payment as soon as he reasonably may; and if he does not, he keeps it at his own peril."

This consequence, however, can only arise in the event of the *bank's failure, with sufficient funds of*

the drawer in their possession to meet the check. While the bank remains solvent, the drawer is liable. He cannot withdraw the money appropriated to the check, and plead neglect of the holder in presenting it! If he has not placed sufficient money in the bank to pay the check, or if he has withdrawn it before payment, whether the bank does or does not fail, he remains liable notwithstanding the lapse of time; for it was a fraud upon the holder to withdraw the money which should have been appropriated to the payment of the check, and in this case he is not entitled to notice of presentment and non-payment.

If you take from your debtor, not his own check, but a *check of a third person*, you will understand that it has been in circulation longer than the time above specified, and that the drawer cannot be held in case the bank fails; but the person giving the check will be held to guaranty the bank's solvency, until the holder has had the above reasonable time to present it. "Though each party," says Chitty, "may be allowed a day, as between him and the party from whom he received a check, it would be otherwise as to the drawer, if the banker should, during a succession of several days, fail, and would have paid, if the check had been presented the day after it was drawn; a check being an instrument not in general intended by the drawer to be long in circulation, and in that respect differing from a country banker's note, which is known to all parties to have been intended to be in circulation, and not so promptly presented for payment as a check."

Checks differ from Drafts and Bills of Exchange, in being payable on the day of their date without acceptance, and without allowance for days of grace. The law treats a check with the same favor as other negotiable paper, in not requiring the holder to prove value given, unless he has obtained it under suspicious circumstances; but if a check has been lost, the owner must then prove that he obtained it for a valuable consideration, and in good faith.

It seems that the *death of the drawer*, is a countermand of the banker's authority to pay a check, but if the bank should pay the check before notice of the drawer's death, the payment is good, (2 Ves. Jr. 118.) A bank is not bound to pay a check unless it has *full funds*, and it is not obliged to pay or accept to pay if it has partial funds only. A bank is liable in damages for refusing to pay a customer's check after it has received the money; but if it had applied the money to the payment of the customer's note or acceptance made payable at the bank, though without any further authority, that will be a good defence to an action for dishonoring the check.

If the sum for which a check is drawn be *fraudulently altered and increased*, and the bank pay the larger sum, it cannot charge its customer with the excess, but must bear the loss. But should any act of the drawer himself have facilitated or given occasion to the forgery, *he* must bear the loss. Thus where a person filled up a check for *fifty-two pounds two shillings*, beginning the word *fifty* with a small letter in the middle of a line, and his clerk inserted "three hundred" before the word *fifty*, and the figure 3 before the figures £52 2s., and presented it,

and the bank paid £352 2s., it was held that the improper mode of filling up the check had invited the forgery, and therefore the loss fell upon the customer, and not the banker.

IV. Again, payment is sometimes made *by giving a new security for an old one*, and if the former be of a *higher nature* than the latter—as a bond under seal for a Promissory Note—the proof of acceptance of such security will support the defence of payment. But where the debtor gives *his own negotiable Note or Bill* for a pre-existing debt, there is some conflict between the American authorities as to whether it is *prima facie* evidence of a conditional, or an absolute payment. By the English decisions, the receipt of bills is not deemed payment, unless expressly so agreed, or the bills have been negotiated, or are otherwise outstanding against the debtor. And, in general, by our law, unless specially agreed, according to Story, “The taking of a Promissory Note for a pre-existing debt, or a contemporaneous consideration, is treated *prima facie*, as a conditional payment only; that is, as payment only if it is duly paid at maturity. But in some of the American States” (Massachusetts and Vermont) “a different rule is applied, and unless it is otherwise agreed, the taking of a Promissory Note is deemed *prima facie* an absolute payment of the pre-existing debt or other consideration. But in each case, the rule is founded upon a mere presumption of the supposed intention of the parties, and is open to explanation and rebutter by establishing by proper proofs, what the real intention of the parties was, and this may be established, not only by *express*

words, but by reasonable implication from the attendant circumstances."

When the creditor accepts *the Promissory Note or Bill of a third person* for a pre-existing debt, the debt is extinguished, though the security may prove to be worthless. But here, says Greenleaf, "it must appear to have been the voluntary act and choice of the creditor, and not a measure forced upon him by necessity, where nothing else could be obtained. Thus, where the creditor received the note of a stranger who owed his debtor, the note being made payable to the agent of the creditor, it was held a good payment, though the promisser afterward failed. So, when goods were bargained for, in exchange for a Promissory Note held by the purchaser as indorsee, and were sold accordingly, but the note proved to be forged, of which, however, the purchaser was ignorant, it was held a good payment. So, where one entitled to receive cash, receives, instead thereof, Notes or Bills against a third person, it is payment, though the securities turn out to be of no value. But if the sale was intended for cash, the payment by the Notes or Bills being no part of the original stipulation; or the vendor has been induced to take them by the *fraudulent misrepresentation* of the vendee, as to the solvency of the parties; or they are forged; or they are forced upon the vendor by the necessity of the case, nothing better being attainable, it is no payment. If, however, a creditor, who has received a draft or note upon a third person, delays for an unreasonable time to present it for acceptance and payment, whereby a loss accrues—the loss is his own. So, if he alters

the bill, and thus vitiates it, he thereby causes it to operate as a satisfaction of the debt. So, if he accepts from the drawee other bills in payment of the draft, and they turn out to be worthless."

In giving receipts for Notes or Bills, where it has not been agreed that they shall be taken at the creditor's own risk, it is always advisable to state in the receipt that, "*when paid*," they will be in full satisfaction of the debt.

V. When payment is made *by remitting money by mail to the creditor*, the debt is discharged if the debtor can show that the letter containing it was properly sealed and directed, and that it was delivered into the post-office, and not to a private carrier or porter; and further prove either the express direction of the creditor to remit in that mode, or a usage, or a course of dealing, from which such authority might be inferred. Where these circumstances concur and a loss happens, it is the loss of the creditor; otherwise the remittance is at the debtor's risk. It is held by some, that the sending of bank notes uncut, will not discharge the debtor; because, among prudent people it is usual to cut such securities in halves, and send them at different times.

VI. With regard to the *appropriation of payments*, it is a general rule of law, that a debtor, owing several debts to the same creditor, may apply the payment, *at the time of making it*, to which debt he pleases. If he makes a general payment without appropriating it, the creditor may apply it, as he pleases. And where neither party appropriates it, the law will apply it according to its own view of

the intrinsic justice and equity of the case. As a general rule, in case of divers claims, Courts will apply a payment to those debts for which the security is most precarious. Where there is a running account, in the absence of circumstances to show a different intention, they will apply it to the items of debt antecedently due in the order of the account. If one debt is illegal, and the other is lawful; or, if one debt is not yet payable, but the other is already overdue, a general payment will be ascribed to the latter. And if one debt bears interest, and the other does not, the payment will be applied to the debt bearing interest. If one of two demands is within the operation of the *Statute of Limitations*, and the other is not, this circumstance does not prevent the ascription of a general payment to the former demand, when the debtor himself has not appropriated it at the time.

CHAPTER XV.

WILLS AND TESTAMENTS.

SUGGESTIONS TO PERSONS ABOUT MAKING THEIR WILLS.

OUR task is approaching its termination. Commencing with Agency as the starting point in an ordinary business career, we have endeavored to furnish the trader or merchant, with a lamp, replenished with the expensive oil distilled in judicial laboratories, by which to light his footsteps around some of the numerous and concealed obstructions that may at any moment arrest his progress, and defeat his plans. We now assume that he has made the journey in safety, and though he may have descended into the dark and tomb-like valley of Insolvency, he has emerged again, paid his debts, and reached the goal of Independence. One thing then only remains, and that is, to endeavor to aid him in making such a disposition of his accumulations as, in the event of his decease, they will, with certainty, reach the objects intended to be benefited by his bounty.

The law, within certain restrictions, allows to every man of sound mind, the privilege of directing what disposition shall be made of his property after his death: and it has been said, that it is *the duty* of every man to avail himself of this privilege; or, in other words, to make a Will. It is certainly a

duty in all cases, where the individual has neither wife nor children; or if he have, where the property will more than suffice for a support to the widow, and an independence to the children. A Will should be regarded as a means of discharging those obligations, and debts of friendship, honor, and charity, which have been neglected during life; and there are few men, having property, who have not suffered such debts to accumulate. Children, though they have no legal claim to their father's property, contrary to his manifest wishes, not even to a shilling, as is commonly supposed, undoubtedly have a moral claim to his first and particular consideration. But, unless they have proved themselves to be individuals of more than ordinary prudence and virtue, it would seem to be a mistaken kindness to endow them, by testamentary bequests, with more than an ample independence. Experience proves that inherited wealth is rarely a blessing; and that the heirs of rich men seldom transmit and perpetuate the fortune bequeathed to them. At all events, it can be neither just nor wise to invest them with superfluous wealth, and leave undischarged obligations which, though the law cannot enforce, are not the less binding.

In considering the objects entitled to his bounty, after the claims of widow and children have been provided for, a testator's attention, we submit, should be directed *first*, to those who are likely to *suffer hardship by his decease*. If he have natural, or adopted children, unprovided for, these, by every principle of justice, are entitled to a liberal and most careful testamentary remembrance. Let him ask

himself who are more friendless than they. Let him reflect that no imaginable condition can be more unfortunate than that of those who, having been nursed in the hot-houses of opulence, and enervated by dependence, are suddenly subjected to poverty, in the helpless state of those "who cannot work, and to beg they are ashamed." Duly reflecting upon the immensity of the evil, he will not neglect to make a Will, nor overlook a due provision for natural and adopted children. After these, the circumstances of *needy relations*—especially of those to whom he has been a patron—will deserve consideration. The fact that an individual who is so unfortunate as to need charity is related to a man of wealth is, in itself, a hardship; for in this case, even the Samaritans of the world pass by on the other side, excusing themselves with the reflection that the stranger, if worthy, can obtain relief from his relatives. Secondly, a testator's attention should be directed toward those from whom he *has received benefits or pleasure*. First in this class we would recommend, to his testamentary remembrance, *faithful clerks and old servants*; then, *personal friends*; then, those friends of all mankind, *the authors*, who instruct or delight; promising artists, and meritorious inventors. Lastly, if, notwithstanding the number of bequests, a surplus yet remains undisposed of, there are many excellent institutions of religion, learning, and charity, any one of which, on application, will cheerfully furnish a form for drawing the bequest, so as to insure the proper execution of a good intention. We mention such incorporated institutions last, because they are established to benefit

individuals not known to the testator, and the claims of strangers can, with propriety and justice, be considered only, after the list of those known to the testator as worthy of his favor, is exhausted. And secondly, because the frequent mismanagement, and misappropriation of funds bequeathed for the establishment or maintenance of such institutions, show that the donation is of a kind which should be made in the lifetime, and under the supervision of the donor.

Now, having determined to make a Will, and arranged the plan and details, it will yet be well, before proceeding to embody your wishes in form, to consider first, what is the nature of your estate.—Does it consist principally of real or personal property? Is your wife dowable of any portion of it? and if you intend to give her a specific bequest, do you intend it in lieu of dower, or in addition to the dower? If in lieu of dower, you must so state it distinctly in your Will, and then she will have her election to refuse one or the other? Have you advanced portions to any of your children, and do you intend what you give them by will to be in addition to their portions, or the advances to be deducted? Lastly, ask yourself, Shall I write my own Will, or employ a lawyer to do it? “If you wish to tie up your property in your family,” says Sugden, “you really must not make your own Will. It were better to die without a Will, than to make one which will waste your estate in litigation to discover its meaning. The words ‘children,’ ‘issue,’ ‘heirs of the body,’ or ‘heirs,’ sometimes operate to give the parent the entire disposition of the estate, although

the testator did not mean any such thing. They are seldom used by a man who makes his own Will, without leading to a lawsuit. It were useless for me to attempt to show you how to make a strict settlement of your property—and therefore I will not try. I could, without difficulty, run over the names of many judges and lawyers of note, whose Wills, made by themselves, have been set aside, or construed so as to defeat every intention which they ever had. It is not even a profound knowledge of law which will capacitate a man to make his own Will, unless he has been in the habit of making the Wills of others. Besides, notwithstanding that fees are purely honorary, yet it is almost proverbial, that a lawyer never does any thing well for which he is not feed. Lord Mansfield tells a story of himself that, feeling this influence, he once, when about to attend some professional business of his own, took several guineas out of his purse and put them into his waistcoat pocket, as a fee for his labor."

If, however, you determine to write your Will without professional assistance, we submit the following suggestions, as worthy of your consideration:—

1. *Be careful to give such a description of yourself as may avoid any confusion and uncertainty in ascertaining the maker of the Will.*

The preliminary flummery which some persons use in beginning their Wills, and which some form books sanction, is mere surplusage. It is, however, prudent to introduce the words, "being of sound and disposing mind," for though not absolutely necessary, the absence of them has sometimes been a

plea in the courts to invalidate the force and efficacy of bequests. But what the law calls the testator's "addition" should be clear and full, and embrace at least his Christian and surname, his place of residence, trade, or occupation.

2. *Great care should be taken in properly describing the legatees.*

Many a father has succeeded to property meant by the testator for his son, and *vice versa*, by the omission or improper use of the term junior. Thus, if a testator leave a legacy to John Smith, of Manayunk, intending it for John Smith, the son, the father would be clearly entitled to it by law, without the introduction of the term junior, or such words as would plainly indicate the son was meant; and so, on the other hand, if the legacy was meant for the father, but he was described as "John Smith, Jr.," because *his* father was alive, the son of the legatee intended to be benefited, might in like manner deprive his father of his legacy. The only safe way, in all such cases, is to describe the legatee with such particularity as cannot admit of a doubt; as "to John Smith, Jun., son of my friend Mr. John Smith, of Manayunk, for whom I stood godfather, the sum of, &c.," or something of a similar kind, which cannot fail to fix identity.

Accuracy in description is especially important in making provision for a natural or an adopted child, in order to exclude the pretension of heirs-at-law; and an eminent English lawyer advises a testator to copy the register from the Parish books, where it was born and christened, and preserve the certificate thereof with the will.

3. *Avoid all ambiguous words or expressions in your devises or bequests, or they may be held void for uncertainty.*

Courts are loth to set aside a Will or a devise for uncertainty, but nevertheless they must and will do it where they cannot penetrate through the obscurity in which the testator has involved his intention. "Conjecture," says Jarman, "is not permitted to supply what the testator has failed to indicate, for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object, to be superseded by the claim of any one not pointed out by the testator with equal distinctness." Thus, a direction to trustees to apply the residue of the testator's personal estate to "*such benevolent, charitable, and religious purposes, as they, in their discretion, may think most advantageous and beneficial,*" was held to be too uncertain, and therefore void. So a request by a testator, that a "*handsome gratuity*" be given to each of the executors. A bequest to *one* of the sons of J. S., without specifying which son, he having several, was held void for uncertainty. So, a devise to two or more of "*my poorest kindred.*" In one of the earliest cases decided to be void for uncertainty, the testator used the words: "I give *all* to my mother." It was adjudged that this expression was insufficient to convey the testator's land to his mother, as it was doubtful to what the word "*all*" referred. So a bequest of "*some of the best of my linen.*" An instance of a bequest held void for uncertainty, on account of the vague use of the word "*survivors,*"

occurs in a recent case, where the words of the bequest were, "I give to my executors £1000 upon trust to be invested in the funds of the Bank of England, during the lives of the *survivors or survivor* for the widows of John Sägee and Thomas Draper, to be divided between them, share and share alike." It was contended for the two legatees that the words "survivors or survivor" applied to the executors, and did not affect the gift to the widows, who therefore were absolutely entitled; but Sir J. Leach observed, that it was impossible to put any rational construction upon the bequest, which therefore was void for uncertainty.

A devise of "what shall remain" or "be left" at the decease of a prior devisee or legatee, is an expression that, as a general rule, should be avoided.*

* "Very embarrassing questions also often arise under last Wills and Testaments, in respect to the persons who are entitled to take, under words of general description: as, for example, under bequests to 'children,' to 'grand-children,' to 'younger children,' to 'issue,' to 'heirs,' to 'next of kin,' to 'nephews and nieces,' to 'first and second cousins,' to 'relations,' to 'poor relations,' to the 'family,' to 'personal representatives,' and to 'servants.' For these words have not a uniform fixed sense and meaning in all cases; but they admit of a variety of interpretations, according to the context of the Will, the circumstances in which the testator is placed, the state of his family, the character and reputed connection of the persons who may be presumed to be the objects of his bounty, and yet who only in a very lax and general sense can be said to fall within the descriptive words. Thus, 'child' or 'children' is sometimes construed to mean 'issue,' and 'issue' to mean children; 'next of kin' is sometimes construed to mean only those who are entitled to take, under the Statute of Distributions, and sometimes to include other persons; 'relations' is sometimes construed to

4. *When making your Will, carefully avoid ambiguity in conditional gifts and devises over in particular events ; and as a general rule, it is best to avoid conditional bequests altogether.*

"It is the folly of most testators," says Sugden, "to contemplate a great many events for which they too often badly provide. You give me a horse, 'and if I die' you give it to my son. Here a question at once arises when the death is to happen—generally? In your lifetime, or in my son's? Pray avoid this; and if you must give any thing over

mean the 'next of kin,' in the strict sense of the words, and sometimes to include persons more remote in consanguinity; 'personal representatives' is sometimes construed to mean the 'administrators or executors,' and sometimes to mean the 'next of kin.' The word 'family' admits of a still greater variety of applications. It may mean a man's household—consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children excluding his wife; or, in the absence of wife and children, it may mean his brothers and sisters, or next of kin; or it may mean the genealogical stock from which he may have sprung. Difficulties may also arise in many cases where there is a bequest or devise to the next of kin, whether they are to take *per stirpes*, or *per capita*. In all these cases, the true meaning in which the testator employed the words must be ascertained by considering the circumstances in which he is placed, the object he had in view, and the context of the Will. When the bequest respects personal or trust property, it naturally, nay, necessarily falls within the jurisdiction of Courts of Equity to establish the proper interpretation of such descriptive words in the particular Will; and neither executors, nor administrators, nor trustees, can safely act in such cases until a proper bill has been brought to ascertain the true nature and character of such bequests or trusts, and to obtain a declaration from the court, of the persons entitled to claim under the general descriptive words."—2 Story, Eq. Jr., § 1065.

after you have given the entire interest to one, state precisely in what event, and if depending upon the death of the first legatee, whether you mean a death in your lifetime, or in the lifetime of the legatee over. And I must tell you that where you have given the absolute interest you ought not to make any gift over, *which will not take effect in a life, or lives, who shall be in existence at your death.* The rule goes somewhat farther; but I would not advise you, without advice, to go beyond the line which I have marked out; and indeed, without advice, you will be more bold than wise to go even so far."

5. *Where you intend a specific devise or bequest, use words of plain direction, as "I give and bequeath," or "I give and devise," when the subject is land; and avoid the use of words of recommendation, or words expressing merely desire or hope.*

In modern times, it has been the policy of the law to limit the doctrine of recommendatory trusts, and to compel testators, if they expect their wishes to be carried into effect, to use words clearly expressing their intention. "The first case," says Sir John Leach, "that construed words of recommendation into a command, made a Will for the testator; for every one knows the distinction between them." Hence, if you intend a command do not say, "I *desire* my executor" to pay a person a certain sum of money. Do not *recommend* your wife to give certain property to certain persons after her death; or as a testator once did, bequeath to her all the residue of the personal estate, "not doubting but that she will dispose of what shall be left at her death to our two grand-children," or "to my near rela-

tions, should she survive me." Even in a case where, after a devise of all his property to his wife, a testator earnestly *conjured* her to make provision for their only child and a grand-daughter, it was held no trust.

It is said that the words, "it is my wish," will generally be construed as words of bequest or gift, but sometimes as merely an inclination of the mind.

6. *Where you give a legacy to a married woman, and intend it to be free from the control of her husband, appoint trustees, and give specific directions that it shall be for her sole and separate use.*

And this precaution is of importance to be observed in a bequest to a woman whether married or unmarried, for women will marry; and, in the event of their marriage, the husband, by virtue of the marital tie, will, in the absence of a *Married Woman's Act*, be entitled to the same.

7. *In devising lands, where you intend to give an uncontrollable right in the estate, and make it descendible to the devisee's heirs, you should use words of inheritance, as to him, "his heirs, and assigns forever."*

"A man thinks when he gives his house to another," says Sugden, "that he gives him the entire interest in it, in the same way as if it were a horse. If, however, you intend to give the estate out and out, you must either add what we call words of inheritance to the gift, or words tantamount to them. It is better not to tell what is equivalent to words of inheritance; you should use the very words themselves. Thus, if you intend to give your estate in Kent to your wife, not for her life merely,

but out and out, give it to 'her, *her heirs, and assigns forever.*' "

It is also advisable, in a devise of lands, or of all your estate, to use the words "*which I have, or may have at my death;*" for though, by the statute laws of most of our States, lands acquired after the execution of a will pass thereby, if such werē the apparent intention of the testator, yet in the majority of the States the intent must clearly appear on the face of the Will.

8. *In the bequest of a specific chattel, as railway shares, subject to future calls, or in the devise of a specific property incumbered with a mortgage, use plain and clear expressions to indicate your intention, whether the legatee or devisee is to take the property subject to, or free from the incumbrance.*

In the absence of such a clear expression of your intention, the legatee or devisee will have the right to require the incumbrance to be discharged out of your general estate, as a debt: the testator "being considered to use the terms merely as descriptive of the incumbered condition of the property, and not for the purpose of subjecting his devisee to the burthen"—a construction which, though well established, it is probable, frequently defeats the intention.

It is however best to avoid bequests of *specific property* altogether, for you may dispose of that property before your decease, and then your intended legatee, though remembered in your Will, will not be benefited by it.

9. *If you have made a Will and subsequently marry, make a new Will, or republish the former Will.*

It is now fully settled that *marriage and the birth of a child*, operate as a revocation of a Will made previously, because they produce a complete change in the situation and the duties of the testator. In several of our States, as Rhode Island, Connecticut, New York, Pennsylvania, Virginia, South Carolina, Georgia, Ohio, Louisiana, the effect of marriage and the birth of a child upon a prior Will, have been definitely settled by statute. Where however it is intended that, notwithstanding these events, the former Will shall stand, it may be re-established by simply re-executing it, or republishing it, as it is called: that is, take your Will, and sign and seal it once more in the presence of the former, or any other witnesses, and let them sign the following attestation at your request, and in your presence: "Resigned, Resealed, Republished, and Redeclared by the above named testator, this — day of —, as and for his last Will and Testament, in the presence of us, who in his presence, at his request, and in the presence of each other, have hereunto set our names as witnesses thereto."

It is especially important for persons who are married, but have no issue, to reflect, when making their Wills, upon the possibility of yet having children before their decease, and to make the dispositions in their wills expressly contingent upon leaving no surviving issue, for as the birth of children *alone* is not a revocation of a former Will, they may be excluded under a Will made when their existence was not contemplated; and cases of great hardship of this kind have sometimes arisen from the neglect of testators to make a new disposition

of their property at the birth of children ; indeed, it has sometimes happened that a testator has left a child *en ventre*, without being conscious of the fact. For the same reason, provisions for the children of a married testator, who has children, should never be confined to the children in existence at the making of the will, unless so intended.

10. *Execute your Will in the presence of three witnesses, declaring it to be your last Will and Testament, and have them sign the following form of attestation :*

“Signed, published, and declared by the said (name of testator), as his last Will and Testament, in the presence of us, who, at the request of the said (name of testator), and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

} Witnesses' names.”

A Will so signed and attested will be good in all the States of this Union, except New Hampshire, where Wills are required to be under *seal*, and the attesting clause there should be “signed, *sealed*, published,” &c. ; and excepting also, that it is generally desirable that the witnesses state their places of residence. This advice, though good and applicable in all the States—and Wills so executed will convey lands situated in any of them—is not however absolutely necessary in all. In New York, New Jersey, Delaware, Virginia, North Carolina, Kentucky, Tennessee, Arkansas, Texas, Ohio, Michigan, Illinois, Indiana, Missouri, Iowa, and Wisconsin, *two* witnesses are sufficient. In Pennsylva-

nia, the law only requires that wills shall be in writing, and signed, and *proved* by two witnesses. In Virginia, North Carolina, Mississippi, Louisiana,* Arkansas, and Texas, attesting witnesses may be entirely dispensed with where a Will can be proved by three credible persons, to have been wholly written and signed by the testator. In North Carolina, however, it is further required that the Will shall be found among the valuable papers of the testator, or in the hands of some third person with whom he lodged it for safe keeping. In some of the States, a person suddenly overtaken by his last sickness and unable to execute a written will, may dictate to friends within hearing, his wishes, announcing them as his last Will and Testament; and if, soon afterward, they are reduced to writing, from recollection, by those to whom they have been entrusted, they will be carried into effect. Such Wills are technically called *nuncupative* Wills.

A Codicil to a will must be executed in the same manner, and with the same formality as the original Will; and where a legacy is already given in the Will, and you afterward give another to the same person by codicil, you should state whether the

* In Louisiana, what they call the *mystic* or *secret testament*, must be signed by the testator, and presented, sealed up in an envelop or otherwise, to a notary and seven witnesses, and acknowledged to them by the testator to be his Will, written by himself or at his dictation, and signed by him. The testator, the notary, and the witnesses, or at least two of them, must sign an attestation called the act of superscription, indorsed by the notary upon the Will, or envelope.

latter is intended to be given in addition to, or in lieu of the former bequest.

11. *Select as witnesses persons of some intelligence and responsibility, and persons who have no interest under the Will, either as legatees or executors.*

A person who is competent to testify in a court of justice is competent to be a witness to a Will; but then, if questioned as to the state of a testator's mind when executing a Will—the evidence of a foolish or incredible person will have very little weight. With regard to *interest* the general rule is, unless changed by statute, that where a person takes a personal or beneficial interest under a Will he is incompetent to testify in its support; hence, a legatee must abandon his legacy, or he is incompetent. But where the interest is merely fiduciary, as that of an executor, he is competent to testify, unless he is primarily responsible for costs. In some of the States an executor is so responsible, at least in the first instance, while in others he is not; hence an executor is competent in some States, in others he is not. *Creditors* are generally competent to be witnesses to a Will, but the credit to be given to their attestation is a question for the determination of a court and jury.

12. *Make no alterations, interlineations, or obliterations in your Will after its execution, unless attested in the same manner as the Will itself.*

A second Will of subsequent date, duly executed, revokes a prior one if inconsistent with it; but if the latter be destroyed and the former is preserved, the first Will thereupon revives. Where two conflicting Wills are left, and neither of them dated,

so that it cannot be determined which is the testator's *last* Will, the maker is declared to have died intestate, and his property will be divided among his next of kin, according to the Statute of Distributions. In making second Wills, it is always advisable to use the words, "hereby revoking all former Wills by me made."

13. *Execute two or three copies of the original Will, enclose them in wrappers well sealed up, and deposit them in different places, with bankers or trustworthy friends.*

A precaution of this kind will save the expense of copies, and prevent the danger of forgery. It will defeat, and perhaps expose, the machinations of those unmitigated scoundrels, who secretly destroy Wills that do not comport with their interests, of whom more than one—certainly one—is yet living, unhung, and even unwhipt of justice.

And lastly, it has been observed if, in addition to the above necessary precautions, every testator would take the trouble *to look over his Will once a year*, as regularly as he balances his books, and consider for a few minutes what alteration has taken place in his circumstances during the preceding year, it is highly probable that innumerable lawsuits and disputes would be prevented.

In the absence of a Will, the law prescribes how the estate of the deceased shall be settled, and what disposition shall be made of his surplus property. Unfortunately, the laws of the individual States composing this Union, regulating the descent and distribution of the property of those who die with

out a Will, called *intestates*, are far from uniform. They may agree in their outlines, but they are so diverse in the details, that it is difficult to determine what principles are of the most general application. Each State has a law of descent for itself; and so different from that of its sister States, that Mr. Reeves, in his *Treatise on the Law of Descents*, has remarked that "this nation may be said to have no general law of descent, which probably has not fallen to the lot of any other civilized country."

When a person has died intestate, the first proceeding is, to have an *administrator* appointed by the courts empowered to grant letters of administration. The persons entitled to these letters, in the States which have adopted the course of the English law on the subject, rank in the following order:—first, husband or wife; second, children, sons or daughters; third, parents, father or mother; fourth, brothers or sisters of the whole blood; fifth, brothers or sisters of the half blood; sixth, grand-parents; seventh, uncles, and aunts, and nephews, and nieces, who stand in equal degree; eighth, cousins. If none of the next of kin will accept the administration, the judge of probate may exercise his discretion whom to appoint; and generally he decrees it to the principal creditor, or the person having the greatest interest in the effects of the intestate. In the city of New York there is a public administrator authorized to act in cases where there are effects in the city, of persons dying intestate, and leaving no widow or next of kin, competent and willing to administer.

Before an administrator will receive a certificate

of appointment, he will be required to give a bond, with sureties, generally to an amount greater than the value of the property likely to come into his hands, conditioned for the faithful execution of his trust. Being thus duly appointed an officer under the law, he must comply strictly with the statutes prescribing his duties and powers, of the State in which he is acting. His first duty is, to make out a statement or *inventory* of the personal property of the intestate as appraised,—in some States also of the real estate,—and file a copy of the same in the proper court or office within a certain time. His duty then is, to collect the outstanding debts, convert them into money, and sell so much of the personal property as may be necessary for the payment of the debts, beginning with articles not required for immediate family use. Having thus collected money, it is his duty to pay the debts in the order prescribed by the law, which generally is, first, expenses of the last sickness, including the physician's bill, and funeral and probate charges; secondly, debts due to the United States, and the State; thirdly, legal liens; and then all other debts equally, and in the case of a deficiency of assets, rateably. In some of the States, preferences are given to certain other debts, as debts for rent, servants' wages, and debts secured by bonds or sealed notes. In Pennsylvania, debts due the commonwealth are directed to be last paid. The penalty for neglecting to pay the debts in the order prescribed by the law of the State, is, that an administrator is liable to make up any deficiency thus occasioned out of his own property.

When the personal property is insufficient to pay

the debts, an administrator may make the real estate assets by adopting the mode prescribed by statute. It is not probable however that he can obtain an order to sell real estate to pay the expenses of the administration; and therefore he should be careful *always to deduct the charges of administration from the amount of assets in his hands.*

When the debts are paid, it is the duty of the administrator to file an account of his administration in the proper court, and within a prescribed time proceed to distribute the surplus property among those entitled to it according to the Statute of Distributions. Each State having its own statute prescribing the distribution of the personal property of intestates, no general rules can be given which will be applicable throughout the Union. In those States which have adopted or essentially re-enacted the English Statute of Distributions, as New York, New Jersey, Vermont, Delaware, Maryland, North Carolina, and Tennessee, the surplus of the personal estate is given:—1. One third thereof to the widow; and the residue, by equal portions, amongst the children of the intestate, and such persons as legally represent them, if dead. 2. If there be no children or their representatives, one half of the personal estate goes to the widow, and the residue to be distributed equally among the next of kin who are in equal degree, and those who represent them; but *no representation is admitted among collaterals after brothers' and sisters' children.* 3. If there be no widow, the estate is to be distributed equally among the children or their representatives; and if no widow nor children, or their representatives, the

surplus goes to the next of kin in equal degree, and their lawful representatives. The father, being next of kin according to the rules of the civil law, succeeds to the whole of the personal estate of one who dies intestate, without wife or issue, and consequently excludes the brothers and sisters; but the mother in such event, if the father be dead, it is provided in the act, shall have only an equal share with the brothers and sisters or their representatives. Relatives of the half blood take equally with those of the whole blood; and posthumous children, whether of the whole or half blood, share with those born in the lifetime of the person whom they represent. A husband is entitled to administer upon the personal property of his wife who dies without a Will, and to hold and enjoy the same for his own benefit; and *if there has been a child of the marriage born alive*, he is entitled to her real estate for life, *as tenant by the courtesy*, as it is called; but on his death, it goes to the heirs of the wife. If, however, the wife die *without having had issue*, her heirs immediately succeed to the estate. Such are the rules of distribution in the States which follow the English statute. In the others there are important modifications. In Ohio, for instance, the widow takes the whole personal property, if there be no children, and, as in Mississippi and Alabama also, the brothers and sisters of the intestate have precedence over his father or mother. In some States, as in Alabama, the whole blood, when of equal degree, are preferred to the half blood; while in Virginia the half blood inherit only half as much as those of

the whole blood. In Indiana, tenancies by courtesy and in dower are abolished.

The powers of an administrator are in general limited to the distribution of personal property. The *real estate* of an intestate, if not required for the payment of his debts, descends to those whom the law designates as his *heirs*. "In the majority of the States," says Kent, "the descent of *real and personal property*, is to the same persons, and in the same proportions, and the regulation is the same in substance as the English Statute of Distributions, with the exception of the widow, as to the real estate, who takes one third for life only, as dower. The half blood take equally with the whole blood, as they do under the English Statute of Distributions. Such a uniform rule in the descent of real and personal property, gives simplicity and symmetry to the whole doctrine of descent."

An administrator's powers do not extend beyond *the limits of the State wherein he is appointed*. Where the intestate has property in several States, an administrator may be appointed in each; or by the laws of many of the States, the administrator appointed in the State where the intestate resided at the time of his death, may administer on property elsewhere, after filing a copy of his certificate or letters in the proper court of the State wherein such property is found, and having the same approved and confirmed. In paying debts, and distributing personal property, administrators must be governed by the laws of the State or country wherein the owner or the intestate had his established residence, or *domicil* as it is called, at the time of his death, and not by

the laws of the places where the goods happen to be. But real estate, as to its transfer and descent, is governed by the law of the place where it is situated.

In all civilized countries, the laws prescribing the descent and distribution of property are founded chiefly on the *relationship* or "consanguinity of persons having a common origin from the same ancestor, and who are therefore said to partake of, or share, his blood." The number of persons who share a common ancestry within no very great number of degrees is astonishing. Every individual has two ancestors in the first degree of the ascending line—his father and his mother; four in the second—the parents of his father and mother; eight in the third; and by the same rule of progression, he has one thousand and twenty-four in the tenth, and more than a million in the twentieth. The increase in the number of collateral kindred, in the descending line, as has been frequently shown, is still more rapid. "If we suppose two brothers," says Judge Smith, "to have each left two children, each of those children two more, these last two each, and so on, two for each person in every generation, there will be in the fifth generation, 256; in the tenth, 262,144; in the twelfth, 4,194,304; and in the twentieth, 274,877,906,944." The sentiment, then, of the old philosopher, that he considered nothing pertaining to man as indifferent to him, was probably the result of a comprehensive calculation as well as the dictate of a humane spirit. The brotherhood of man, therefore, is not an abstraction, but a fact. And we may thus realize more clearly, how vast is

the crime of those constituted expounders of the law, who pervert its spirit by making it an engine of oppression; and how like fratricide it is, to refuse legal protection to any of the human family because they are too weak to protect themselves.

NOTES AND ILLUSTRATIONS.

NOTES AND ILLUSTRATIONS.

LAWYERS AND LAWSUITS.

[Chap. I., p. 34.]

"WHENEVER our business," says Douglass Jerrold, "brings us into contact with the law, we must flee for help to a man who professes to understand it, and who has helped to monopolize the interpretation of it by making it cumbrous and complicated. The profession takes property particularly under its special care. For poverty it has no regard, it has only chastisement. The land a man tills, and the beautiful machines he makes, he can scarcely sell without a lawyer's help. Where property is concerned, a child cannot be portioned, nor a marriage contracted, nor the accumulations of a family fairly disposed of by the most enlightened common sense. It must be done by a lawyer. Whenever we have to walk amidst the intricacies which have been erected by the gentlemen of the bar, we must supplicate the aid of one of their guiding hands, and must pay largely for the assistance. The most ignorant are competent to comprehend nature, and walk as she directs; but the wisest and most sagacious man is not competent, without legal help, to comprehend the laws of the land. The barristers, for their own purposes, hold the human race in tutelage. Mankind are made their wards. They are scarcely allowed to speak in their own behalf they must not defend themselves; they must employ a barrister

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To escape the wiles of one member of the profession they must fee another. If it be said that this applies to attorneys rather than barristers, the reply is, that the attorneys can carry no suit to a conclusion; and that the barristers, whom they instruct and fee, are, for a fee, the ready instruments of their dirtiest work. Thus, designedly or undesignedly, the members of the profession do, in fact, make business for each other, and gather wealth by enclosing industry in their toils. The productive classes are their legal prey. They are ligatures impeding the growth, and issues drawing off the life-blood of society; they remove no inconvenience; they create no convenience. A physician or surgeon assuages pain, and may be a comfort to his patient; lawyers are only plagues, and even those who use them for bad purposes receive their services with impatience: they neither feed, clothe, instruct, nor cure their fellows: they are the offspring of conquest, oppression, and wrong; and their lives are passed in supporting the cause of their parents."

If we were called upon to defend the profession against Mr. Jerrold's attack, we would retain our brother of the Far West, whose speech in an important case has been preserved. Said he:

"Gentlemen of the Jury: Can you for an instant suppose that my client here, a man who allers sustained a high depredation in society, a man all on you suspect and esteem for his many good qualities; yes, gentlemen, a man what never drinks less than a quart of likker a day—can you, I say, for an instant, suppose that this ere man would be guilty of hooking a box of percushum caps! Rattlesnakes and coon-skins forbid! Picter to yourselves, a feller fast asleep in his log cabin, with his innocent wife and orphan children by his side, all nature hushed in deep repose, and naught to be heard but the muttering of the silent thunder, and the hollering of bull frogs, then imagine to yourselves a feller sneaking up to the door like a despicable hyena, softly entering the dwelling of the peaceful and happy family, and in the most mendacious and dastardly manner, hooking a whole box of percushum caps! Gentlemen, I will not, I cannot dwell upon the monstrosity of such a scene! My feelings turn from

such a pacter of moral turpentine, like a big woodchuck would turn from my dog Rose! I cannot for an instant harbor the idea that any man in these diggins, much less this 'ere man, could be guilty of committing an act of such rantankerous and unexampled discretion.

"And now, gentlemen, after this 'ere brief view of the case, let me entreat you to make up your minds candidly and impartially, and give us such a verdict as we might reasonably suspect from such an enlightened and intolerable body of our fellow-citizens; remembering that, in the language of Nimrod, who fell in the battle of Bunker Hill, it is better that ten men escape, rather than one guilty one should suffer."

And for a Judge, we should like to have the author of the following luminous definition of murder:

"Murder, gentlemen, is where a man is murderously killed. The killer in such a case, is a murderer. Murder by poison is as much murder, as murder with a gun. It is the murdering which constitutes murder in the eye of the law. You will bear in mind that murder is one thing and manslaughter another; therefore, if it is not manslaughter it must be murder. Self-murder has nothing to do with this case. One man cannot commit *felo de se* on another; that is clearly my view. Gentlemen, I think you can have no difficulty. Murder, I say, is murder. The murder of a father is fratricide; but it is not fratricide if a man murders his mother. You know what murder is, and I need not tell you what it is not. I repeat that murder is murder. You may retire upon it if you like."

When a Kentucky judge, some years since, was asked by an attorney, upon some strange ruling, "Is that law, your honor?" he replied—"If the court understand herself, and we think she do, it are!"

ELEMENTARY LAW BOOKS

[Chap. I., p. 37.]

LAWYERS, in many instances, have not manifested a due appreciation of the labors of those who have endeavored to diffuse a knowledge of the principles of law by rendering its study less difficult and disagreeable. Even Blackstone's Commentaries, when they appeared, were greeted with the sneers and whispered censures of many of the black-letter lawyers. It became the fashion among a certain class to decry them. A gentleman, not long since dead, was told by one who prided himself on being of the old school, that there was scarcely one page in Blackstone in which there was not one false principle and two doubtful principles stated as undoubted law. Horne Tooke, who was always ambitious of a legal reputation, declared "that it was a good gentleman's law-book, clear but not deep." It was, in short, obnoxious to one charge, viz.: that it was *intelligible*. Mr. Hargrave is reputed to have said that, "any lawyer who writes so clearly as to be intelligible was an enemy to his profession."

III.

PREJUDICE AGAINST LAWYERS

[Chap. I., p. 38.]

OF the abstract character of a lawyer, a brilliant but superficial Essayist thus writes:—"His soul is in his fee—his understanding is on the town. He will not swear to an untruth to get himself hanged, but he will assert it roundly by the hour together, to hang other persons, if he finds it in his retainer. What a tool in the hands of a minister is a whole profession habitually callous to the distinctions of right and wrong, but perfectly alive to their own interests; with just ingenuity enough to be able to trump up some fib or sophistry for or against any measure, and with just understanding enough to see no more of

the real nature or consequences of any measure than suits their own or their employers' advantage."

The following anecdote has been related of Foote:—A gentleman in the country, who had just buried a relation, an attorney, complained to Foote of the great expenses of a country funeral. "Why, do you *bury* attorneys here?" gravely inquired Foote. "Yes, to be sure: how else?" "Oh! we *never* do that in London." "No!" exclaimed the other, much surprised, "why how do you manage then?" "Why when the patient happens to die, we lay him out in a room over night by himself, lock the door, throw open the sash, and in the morning he is entirely off." "Indeed," said the gentleman, amazed, "and pray what becomes of him?" "Why, that we cannot exactly tell, not being acquainted with supernatural causes. All that we *know* of the matter is, that there is a strong smell of brimstone in the room the next morning!"

One of the causes which, next to the ill conduct of some members of the profession, has fostered a prejudice against lawyers, is a misapprehension of their duties. Moralists especially have been shocked at the idea, that men of learning and talents should hold themselves out as ready to employ their abilities and ingenuity, in almost any case, without much regard to the persons or characters of their clients.

"For fees, to any form they mould a cause—
The worst has merits, and the best has flaws
Five guineas make a criminal to-day,
And ten, to-morrow, wipe the stain away."

The cavillers and satirists do not reflect that if a counsel were to refuse to appear on behalf of any one, because he considered him to be wrong, he would assume the office of the judge without possessing the power of the judge to ascertain the whole truth, and thus an innocent individual might suffer. Sir Matthew Hale relates that there were cases brought to him, which, by the ignorance of the attorney in stating them, seemed to be

very bad; but upon inquiring more closely into their merits, he discovered them to be really good and just. After this, he states that he relaxed much "of his former strictness, of refusing to meddle in causes upon the ill circumstances that appeared in them at first."

"Sir," said Dr. Johnson to Sir William Forbes, "a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly: the justice, or injustice, of the cause is to be decided by the judge. Consider, sir, what is the purpose of courts of justice—it is that every man may have his cause fairly tried by men appointed to try causes. A lawyer is not to tell what he knows to be a lie—he is not to produce what he knows to be a false deed—but he is not to usurp the province of the jury and of the judge, and determine what shall be the effect of evidence, what shall be the result of legal argument. If," he soon after observed, "by a superiority of attention, of knowledge, of skill, and a better method of communication, a lawyer has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage on one side or the other, and it is better that that advantage should be by talents than by chance."

It is a lawyer's duty to do for his client all that his client might fairly do for himself, if he could.

IV.

LAWSUITS SHUNNED BY LAWYERS

[Chap. I., p. 53.]

LAWYERS are, it is notorious, a class least anxious of any "to go to Law." Their antipathy to appearing before a court in any other shape than that of representatives of other individuals, results, as we may fairly suppose, from the intimate knowledge they possess of "what a law suit is." It has been related of Mr. Maryatt, the eminent king's counsel, that some time after he had

retired from practice, being present at a conversation, in which some one remarked on "the glorious uncertainty of the law," he observed with great animation, "If any man were to claim the coat upon my back, and threaten my refusal with a law suit, he should certainly have it; lest in defending my coat, I should find that I was deprived of my waistcoat also." Dunning is known to have dreaded, above all things, becoming involved in litigation. One day, on returning to his house near town, he was met in the front garden by the gardener, full of complaints of some "owdacious fellow," whom he had found trespassing in one of the neighboring fields. "Well, and what did you say to him?" inquired Dunning. "Oh! sir, I told him if I found him there again, you would be sure to prosecute him." "You may prosecute him yourself, John, if you like; but I tell you what, he may walk about my fields till he is tired, before I will prosecute him!"

COMMON LAW MAXIMS RESPECTING REAL PROPERTY.

[Chap. I., p. 50.]

1. *Every man's house is his castle.*

In the case which is always referred to (Semayne's case, Rep. 91,) showing the application of this well-known maxim, the following points were resolved:

1st. That the house of every one is his castle, as well for his defence against injury and violence, as for his repose; and, consequently, although the life of man is a thing precious and favored in law, yet, if thieves come to a man's house to rob or murder him, and the owner or his servants kill any of the thieves in defence of himself and his house, this is not felony. So, if any person attempt to burn, or burglariously to break, any dwelling-house in the night-time, or attempt to break open a house in the day-time, with intent to rob, and be killed in the attempt, the slayer shall be acquitted and discharged, for the

homicide is justifiable. So, in defence of his house, a man is justified in killing a trespasser who would forcibly dispossess him of it; and in these cases not only the owner, whose person or property is thus attacked, but his servants, and the members of his family, or even strangers who are present at the time, are equally justified in killing the assailant.

In order, however, that a case may fall within the preceding rule, the intent to commit such a forcible and atrocious crime as above-mentioned must be clearly manifested by the felon; otherwise the homicide will amount to manslaughter, at least, if not to murder.

2ndly. It was decided that when any house is recovered by ejectment, the sheriff may break the house to deliver possession thereof to the lessor of the plaintiff.

3rdly. The third exception to the general rule is, where the execution is at suit of the Crown, as where a felony or misdemeanor has been committed, in which case the sheriff may break open the outer door of the defendant's dwelling-house, having first signified the cause of his coming and desired admission.

But bare suspicion touching the guilt of the party will not warrant the proceeding to this extremity, though a felony has been actually committed, unless the officer comes armed with a warrant from a magistrate grounded on such suspicion.

4thly. In all cases where the door is open, the sheriff may enter a house and do execution, either of the body or goods, at the suit of any subject; and the landlord may in such case likewise enter to distrain for rent. But the sheriff cannot, in order to execute a writ of *ca. sa.* or *fi. fa.* at suit of a private person, break open the outer door of a man's house, even after request made, and refusal to open it; nor can the outer door be broken open in order to make a distress, except in the case of goods fraudulently removed.

Where, however, the sheriff has obtained admission to a house, he may justify subsequently breaking open *inner doors*, if he finds that necessary, in order to execute his process.

The privilege which, by the fourth resolution in *Semayne's* case, was held to attach to a man's house, must, however, be strictly confined thereto, and does not extend to barns or out-houses unconnected with the dwelling-house. It admits also of this exception, that, if the defendant, after being arrested, escape, the sheriff may, after demand of admission and refusal, break open either his own house or that of a stranger for the purpose of retaking him. If the sheriff breaks open an outer door, when he is not justified in doing so, this does not vitiate the execution, but merely renders the sheriff liable to an action of trespass. The Court, or a judge, however, will, in general, discharge the party out of custody, when arrested, or restore the goods when taken, by such means.

5thly. It was resolved, that a man's house is not a castle for any one but himself, and shall not afford protection to a third party who flies thither, or to his goods, if brought or conveyed into the house to prevent a lawful execution, and to escape the ordinary process of law; and, in these latter cases, the sheriff may, after request and denial, break open the door, or he may enter, if the door be open. It must be observed, however, that he does so at his peril; and if it turn out that the defendant was not in the house, or had no property there, he is a trespasser.

2. *Enjoy your own property in such a manner as not to injure that of another person.*

A man must so use his own rights and property as to do no injury to those of his neighbor, for in all civil acts the law does not so much regard the intent of the actor, as the loss and damage of the party suffering. Thus, if a man lop a tree, and the boughs fall upon another, *ipso invito*, yet an action lies; so, if a man shoot at a butt and hurt another unawares, an action lies. A. has land through which a river runs to turn B.'s mill. A. lops the trees growing on the river side, and the loppings accidentally impede the progress of the stream, which hinders the mill from working, A. will be liable. So, if I am building my own house, and a piece of timber falls on my neighbor's

house, and injures it, an action lies ; or, if a man assault me, and I lift up my staff to defend myself, and in lifting it strike another, an action lies by that person, and yet I did a lawful thing ; and the reason of all these cases is, because he that is damaged ought to be recompensed. But it is otherwise in criminal cases ; the intent and the act must both concur to constitute the crime.

Again, if a man builds a house so close to mine that his roof overhangs mine, and throws the water off upon it, this is a nuisance, for which an action will lie. So, if by an erection on his own land, he obstructs my ancient lights and windows ; for a man has no right to erect a new edifice on his ground so as to prejudice what has long been enjoyed by another. In like manner, if a man, by negligence and carelessness in pulling down his house, occasion damage to, or accelerate the fall of, his neighbor's, he will be clearly liable, though it has been decided that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall, nor, if he be ignorant of the existence of such adjoining wall, is he bound to use extraordinary caution in pulling down his own.

It has also recently been held, that if a person builds a house on his own land, which has previously been excavated to its extremity for mining purposes, he does not acquire a right to support for the house from the adjoining land of another, at least until twenty years have elapsed since the house first stood on excavated land, and was in part supported by the adjoining land, so that a *grant* by the owner of the adjoining land of such right to support may be inferred ; and this case is an authority to show, that a man, by building a house on the extremity of his own land, does not thereby acquire any right of easement for support, or otherwise, over the adjoining land of his neighbor. He has no right to load his own soil, so as to make it require the support of that of his neighbor, unless he has some grant to that effect.

Again, the rule of law which governs the enjoyment of a

stream flowing in its natural course over the surface of land belonging to different proprietors is well established, and is particularly illustrative of the maxim under consideration. According to this rule, each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, and to use the same as he pleases for any purposes of his own, provided that they be not inconsistent with a similar right in the proprietor of the land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water, which would otherwise naturally descend; nor can any proprietor below throw back the water without the license or grant of the proprietor above.

But the owner of land through which water flows in a subterraneous course has no right or interest in it (at all events, in the absence of an uninterrupted user of the right for more than twenty years) which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry; for, according to the principle above stated, if a man digs a well in his own land so close to the soil of his neighbor as to require the support of a rib of clay or stone in his neighbor's land to retain the water in the well, no action would lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it would seem to make no difference as to the legal right of the parties if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary, which is, in substance, the very case above stated.

Not only, moreover, does the law give redress where a substantive injury to property is committed, but, on the same principle, the erection of any thing offensive so near the house of another as to render it useless and unfit for habitation is actionable, though an action cannot be maintained for the *reasonable* use of

a person's right, although exercised so as to occasion annoyance or inconvenience to another; as, if a butcher, brewer, &c., carry on his trade in a convenient place; or if a man build a house whereby my prospect is interrupted, or open a window whereby my privacy is disturbed; in which latter case, the only remedy is to build on the adjoining land opposite to the offensive window.

According to the maxim *sic utere tuo ut alienum non ledas*, a person is also liable for the consequence of his own neglect. Hence, it was held, that an action lies against a party for so negligently constructing a hay-rick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbor's house was burnt down. In such a case, the proper criterion for the guidance of the jury is, whether the defendant has been guilty of gross negligence, viewing his conduct with reference to the caution which a prudent man would, under the given circumstances, have observed.

So, the owners of a canal, taking tolls for the navigation, are, by the common law, bound to use reasonable care in making the navigation secure, and will be responsible for the breach of such duty upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable to neglect on leaving a trap-door open without any protection, by which his customers suffer injury.

Where, however, in cases similar to the preceding, the immediate and proximate cause of damage is the unskillfulness of the plaintiff, he cannot recover; as, where it appeared that some bricklayers, employed by the defendant, had laid several barrows full of lime rubbish before the defendant's door, the plaintiff was passing in a single horse-chaise, and the wind raised a whirlwind of the lime rubbish, that frightened the horse, which was usually very quiet; he started on one side, and would have run against a wagon, which was meeting them, but the plaintiff hastily pulled him round, and the horse then ran over a lime heap lying before another man's door; by the shock the shaft was broken, and the horse being thus rendered still more

alarmed, ran away, and the chaise being overset, the plaintiff was thrown out, and hurt; it was held, that as the immediate and proximate cause of the injury was the unskillfulness of the driver, the action could not be maintained.

The law also requires, that persons having in their custody instruments of danger should keep them with the utmost care. Where, therefore, defendant being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger, when the gun went off; it was held, that the defendant was liable to damages in an action on the case. "If," observed Lord Denman, delivering the judgment of the Court of Queen's Bench in a recent case, "I am guilty of negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third; and if that injury should be brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.

VI

STATEMENTS AS FACTS, AND STATEMENTS AS OPINIONS.

[Chap. VII., p. 161.]

THE difference between statements as matters of fact, and as mere inference or opinion, is illustrated still further by some of the old decisions as to what constitutes a libel. "If a man say of a counselor of law, 'Thou art a daffa-down-dilly,' an action lies." (1 Vin. Ab. 465.) "He hath no more law than Mr. C.'s bull." These words spoken of an attorney, the court inclined to think that they were actionable, though it had not been pleaded that C. had a bull. (1 Sid. 327, fol. 8; Pasch. 8, Car. 11.) The chief justice was of opinion that if C had *not* a bull, the

scandal was greater; and the court held, that to say of a lawyer, "He hath no more law than a goose," is also actionable. There is a query added, whether saying, "He hath no more law than the man in the moon," be libelous; the law doubtless contemplating the possibility of there *being* a man in the moon, and he a sound lawyer. To say to a man "You enchanted my bull," (Sid. 424); to say, "Thou art a witch," or, "that such a person bewitched my husband to death," is clearly actionable. (Cro. Eliz. 312.) On the other hand, you may say, if you please, of another, "That he is a great rogue, and deserves to be hanged as well as G, who was hanged at Newgate;" because this is a mere expression of opinion, and perhaps you might think that G did not deserve hanging. (T. Jones, 157.) You may say that you know "Mr. Smith struck his cook on the head with a cleaver, and cleaved her head; that one leg lay on one side, and one on the other," because it is only to be *inferred* that thereby Mr. Smith's cook died, and this in the reported case is not stated. (Cro. Jac. 81.) *A fortiori*, you might say, "Mr. Smith threw his wife into the river, and she never came up again," or "Mr. Smith cut off Jack Style's head, and walked with it into Leicester town;" for this is all inference.

VII.

MISTAKE IN A BOND.

[Chap. X., p. 254.]

ROGER NORTH relates an anecdote of a Mr. Stutville, who had exposed himself to the vengeance of an individual named Robinson, whose domestic happiness he had destroyed. In order to repair the injury he had done, he gave Robinson a bond for £1500. The bond was prepared by a scrivener, who accidentally omitted in the conditional part, the words "else to remain in full force." After the sealing, the omission was discovered, and Robinson, in a terrible passion, posted off to the scrivener. "Here is a condition," said he, "to make the bond void, but

none to make it good." The scrivener told him that the mistake was not to be remedied, but, at last, was forced to insert the proper words, of which fact he apprised Stutville. North, who was Stutville's counsel, apprehending that Robinson would not proceed on the bond until the scrivener's death, preferred an information against Robinson for forgery, who dreading the conviction, gave up the bond. "But this unexpected success," says Roger North, "made such an impression on Stutville's wild brains, that he thought there could be no lawsuit desperate; and from that time he never did any man justice, but ruined himself by perverse lawsuits, and at last died in gaol. Perhaps had he paid the £1500, his punishment had been less."

APPENDIX OF FORMS.

AGENCY.

Chap. II., p. 54.

THE instrument establishing the relation of Principal and Agent is called a **POWER OF ATTORNEY**.

A Power of Attorney to convey lands, must be acknowledged with the same formality by both husband and wife, as is required in a conveyance of the lands. Powers of Attorney to be used in a foreign country, should be acknowledged before a Notary Public, and certified by the Consul of the country in which it is to be used. An attorney cannot appoint a substitute, unless express authority to do so be given in the Power.

I. General Power of Attorney.

Know all Men by these Presents, that I, A. B. of the city of ———, State of ———, have made, constituted and appointed, and by these present do make, constitute and appoint C. D., of my true and lawful attorney for me and in my name, place and stead, to [*here insert the things which the attorney is to do*]; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said

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attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal, this
day of one thousand eight hundred and

A. B. [SEAL.]

sealed and delivered in the presence of

II. Power to Transfer Stock.

Know all Men by these Presents, that I, A. B. of —— for value received, do hereby irrevocably constitute and appoint C. D. to be my true and lawful attorney, for me and in my name and behalf, to sell, assign and transfer unto E. F., or any other person or persons, —— shares in the capital stock of the ——.

And further, one or more persons under him to substitute with like power.

In witness whereof, I have hereunto set my hand and seal
this day of A. B. [SEAL.]

Witness present,

III. Transfer of Stock.

Know all Men by these Presents, that I, A. B. of —— for value received, have bargained, sold, assigned and transferred, and by these presents, do bargain, sell, assign and transfer, unto C. D., and do hereby constitute and appoint C. D. true and lawful attorney irrevocable, for me and in my name and stead, but to his use, to sell, assign, transfer and set over, all or any part of the and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that my said attorney, or his substitute or substitutes, shall lawfully do by virtue hereof.

In witness whereof, I have hereunto set my hand and seal the
day of one thousand eight hundred and

Signed, sealed and delivered } A. B. [SEAL.]
in presence of }

IV. Power of Substitution.

Know all Men by these Presents, that I, C. D., of the city of _____ in the county of _____ and State of _____ by virtue of the authority to me given by the letter of attorney of A. B. of _____ hereto annexed, do substitute E. F. of the town of _____ in the county of _____ and State of _____ as attorney in my stead, to do, perform, and execute, every act and thing which I might or could do by virtue of said power of attorney; hereby ratifying and confirming all that the said substitute may do in the premises, by virtue hereof and of the said letter of attorney

In witness whereof, &c

V. Revocation of Power of Attorney.

WHEREAS I, A. B. of the town of _____ in the county of _____ and State of _____ by my certain power of attorney, bearing date the _____ day of _____ in the year one thousand eight hundred and _____ did appoint C. D. of the *same place*, my true and lawful attorney, for me and in my name, [*here set out what he was authorized to do, using the precise language of the power of attorney originally given him*], as by the said power of attorney, reference thereunto being had, will more fully appear :

Now, Know all men by these presents, that I, A. B., aforesaid, have countermanded and revoked, and by these presents do countermand, revoke, and make void the said letter of attorney and all power and authority thereby given, or intended to be given to the said C. D.

In witness whereof, I have hereunto set my hand and seal, this _____ day of _____ one thousand eight hundred and _____

Sealed and delivered in }
presence of }

A. B. [SEAL.]

PARTNERSHIP.

[Chap. III., p. 79.]

I. Articles of Copartnership.

ARTICLES OF COPARTNERSHIP made and concluded this —— day of ——, in the year one thousand eight hundred and ——, by and between A. B. —— of the first part, and C. D. —— of the second part, both of ——, in the county of ——.

Whereas, it is the intention of the said parties to form a copartnership for the purpose of carrying on the business of ——, for which purpose they have agreed on the following terms and articles of agreement, to the faithful performance of which they mutually bind and engage themselves, each to the other, his executors and administrators.

First. The style of the said copartnership shall be ——; and it shall continue for the term of —— years from the above date, except in case of the death of either of the said parties within the said term.

Second. The said A. B. and C. D. are the proprietors of the stock, a schedule of which is contained in their stock book, in the proportion of two thirds to the said A. B., and of one third to the said C. D.; and the said parties shall continue to be owners of their joint stock in the same proportions—and in case of any additions being made to the same, by mutual consent, the said A. B. shall advance two thirds, and the said C. D. one third of the cost thereof.

Third. All profits which may accrue to the said partnership shall be divided, and all losses happening to the said firm, whether from bad debts, depreciation of goods, or any other cause or accident, and all expenses of the business, shall be borne by the said parties in the aforesaid proportions of their interest in the said stock.

Fourth. The said C. D. shall devote and give all his time and attention to the business of the said firm, as a salesman, and generally to the care and superintendence of the store: and the

said A. B. shall devote so much of his time as may be requisite in advising, overseeing, and directing the importation of ——— and other articles necessary to the said business.

Fifth. All the purchases, sales, transactions, and accounts of the said firm, shall be kept in regular books, which shall be always open to the inspection of both parties and their legal representatives respectively. An account of stock shall be taken, and an account between the said parties shall be settled as often as once in every year, and as much oftener as either partner may desire, and in writing request.

Sixth. Neither of the said parties shall subscribe any bond, sign or indorse any note of hand, accept, sign, or indorse any draft or bill of exchange, or assume any other liability, verbal or written, either in his own name or in the name of the firm, for the accommodation of any other person or persons whatsoever without the consent in writing of the other party: nor shall either party lend any of the funds of the copartnership without such consent of the other partner.

Seventh. No importation or large purchase of stock or other things shall be made, nor any transaction out of the usual course of the ——— business, shall be undertaken by either of the partners without previous consultation with, and the approbation of, the other partner.

Eighth. Neither party shall withdraw from the funds or joint stock more than the sum of ——— per annum, in weekly installments of ———, or more than his share of the profits then earned, nor shall either party be entitled to interest on his share of the capital; but if, at the expiration of the year, a balance of profits be found due to either partner, he shall be at liberty to withdraw the said balance, or to leave it in the business, provided the other partner consent thereto, and in that case he shall be allowed interest on the said balance.

Ninth. At the expiration of the aforesaid term, or earlier dissolution of this copartnership, the stock or its proceeds, after paying the debts of the firm, shall be divided in the proportions aforesaid; but if the said parties or their legal representatives

cannot agree in the division of stock then on hand, it is hereby agreed that the matter shall be referred wholly to the award, order, and determination of our friends E. F. and G. H., both of ———, and what they shall direct and determine therein, shall be binding and conclusive upon all concerned.

Tenth. For the purpose of securing the performance of the foregoing agreements, it is agreed that either party, in case of any violation of them or either of them, by the other, shall have the right to dissolve this copartnership forthwith, on his becoming informed of such violation.

In witness whereof, we, the said A. B. and C. D., have hereto set our hands the day and year above written.

Executed and delivered }
in presence of }

A. B. [SEAL.]
C. D. [SEAL.]

II. Agreement to Continue a Partnership.

[To be indorsed on the back of the original articles.]

Whereas, the partnership evidenced by the within-written articles has this day expired by the limitations contained herein, [or will expire on the ——— day of ——— next;] IT IS HEREBY AGREED that the same shall be continued on the same terms, and with all the provisions and restrictions herein contained, for the further term of ——— years from this date [or from the ——— day of ——— next.] In Witness whereof, &c.

III. Agreement to Dissolve a Partnership.

[To be indorsed on the original articles.]

We the undersigned, do mutually agree that the partnership formed between us by the within articles, be and the same is hereby dissolved, except for the purpose of the final liquidation and settlement of the business thereof; and upon such settlement, then wholly to determine.

Witness our hands, &c.

LANDLORD AND TENANT.

[Chap. IV., p. 106.]

I. Lease. Form of.

THIS AGREEMENT WITNESSETH, that A. B. of ———, doth hereby grant, demise and let unto C. D. of the same place, all that house and lot with the appurtenances, [*here describe the premises to be let*] for the term of ———, from the ——— day of ———, at the rent of ——— dollars per ———, to be paid in ——— portions on the first days of ———; and the said C. D. doth hereby for himself, his heirs, executors and administrators, covenant and promise to pay to the said A. B. or his assigns, the said rent, in the proportions aforesaid; and that he the said C. D. and his executors and administrators, shall and will not, at any time during the said term, let or demise, or in any manner dispose of the hereby demised premises, or any part thereof, for all or any part of the term hereby granted, to any person or persons whatever, nor occupy or use the same in any other manner than as a ———, without the consent and approbation, in writing, of the said A. B. or his assigns, first had for that purpose—and at the expiration of the said term, yield up and surrender the possession of the said premises, with the appurtenances, unto the said A. B. or his assigns, in the same good order and condition as the same now are, reasonable wear and tear thereof, and accidents happening by fire or other casualties, excepted.

And the said C. D., for himself, his executors and administrators, hereby agrees that all the personal property on the premises shall be liable to distress, and also all personal property if removed therefrom, shall, for thirty days after such removal, be liable to distress, and may be distrained and sold for rent in arrear: the said C. D. and his executors and administrators, hereby waiving all right to the benefit of any laws now made, or hereafter to be made, exempting personal property from levy and sale for arrears of rent.

And the above named C. D. further covenants that he will

permit the said A. B., or his agent, to enter said premises for the purpose of making repairs or alterations, and also to show the premises to persons wishing to hire or purchase; and on and after the first day of ——— will permit the usual notice of "to let" or "for sale" to be placed upon the walls of said premises, and remain thereon, without hindrance or molestation: and also, that if the said premises or any part thereof shall become vacant during the said term, the said A. B., or his agent, may re-enter the same, either by force or otherwise, without being liable to any prosecution therefor; and relet the said premises as the agent of the said C. D., and receive the rent thereof, applying the same, first to the payment of such expense as he may be put to in re-entering, and then to the payment of the rent due by these presents; and the balance (if any) to be paid over to the said C. D.

And the said C. D. hereby further covenants, that if any default be made in the payment of the said rent, or any part thereof, at the times above specified, or if default be made in the performance of any of the covenants or agreements herein contained, the said hiring, and the relation of landlord and tenant, at the option of the said A. B., shall wholly cease and determine; and the said A. B. shall and may re-enter the said premises, and remove all persons therefrom; the said C. D. hereby expressly waiving the service of any notice in writing of intention to re-enter, and all benefit from any errors or neglect of legal forms in making re-entry.

And in consideration that the said C. D. pays the above mentioned rent punctually at the times aforementioned, and performs the covenants aforesaid, the said A. B. hereby doth covenant that the said C. D. shall and may peaceably and quietly have, hold, and enjoy the said demised premises, for the term aforesaid, without any interruption or molestation of the said A. B., his heirs, or any person whatever, claiming or to claim, by, from, or under him or them, or any of them. And also, that in case the said premises shall at any time during the said term be destroyed or injured by an accidental fire, or by the elements the said A. B., his executors administrators, or assigns,

shall and will forthwith proceed to rebuild or repair the said premises, in as good condition as the same were before such destruction or injury; and that until such repairs are made and completed, the said rent shall cease.

It is hereby further agreed, that if the above named C. D. should continue on the above described premises after the termination of the above contract, then this contract is to continue in full force for another ———, and so on from ——— to ——— until legal notice is given for a removal.

In witness whereof, the said A. B. and C. D. have hereunto set their hands and seals, the ——— day of ——— one thousand eight hundred and

Sealed and delivered in }
the presence of }

A. B. [SEAL.]
C. D. [SEAL.]

I, E. F. do hereby agreee to be responsible to A. B. or his assigns, for the true and faithful performance of the above-named contract on the part of C. D. In witness whereof, I have hereunto set my hand and seal, the ——— day of ——— one thousand eight hundred and

Sealed and delivered in }
the presence of }

E. F. [SEAL.]

II. Notice to Quit by the Landlord.

Sir:—Please to take notice that you are hereby required to surrender and deliver up possession of the house and lot known as No. ——— street (*describing the premises,*) which you now hold of me; and to remove therefrom on the first day of ——— next, or at the expiration of the current year of your tenancy.

Dated this ——— day of ———, 185—

A. B.

To Mr. C. D.

Landlord.

III. Notice to Quit By Tenant.

Please to take notice that on the ——— day of ——— next, I shall quit possession and remove from the premises I now occupy, known as house and lot, No. ——— street, in the city of ———
Yours, &c.,

C. D

Dated this ———, day of ———, 185—

To Mr. A. B.

BUYING AND SELLING GOODS.

[pp. 134, 154]

I. Agreement of Sale.

MEMORANDUM of an agreement made between C. M. of the city of Philadelphia, Paper Manufacturer, of the first part and T. K. C. of said city, Printer, of the other part.

Said C. M., for the consideration hereinafter mentioned, doth hereby agree to deliver to said T. K. C., at his Printing Office, No. 1 Lodge Alley, in said city, as the same may be required, from time to time; the whole to be delivered before the first day of January next ensuing the date hereof; One Thousand Reams of Wissahickon Printing Paper, weighing sixty pounds to the Ream, equal to a sample exhibited.

In consideration whereof, said T. K. C. hereby agrees to pay to the said C. M., seven dollars and fifty cents per ream, for each and every ream so delivered, in the notes of the firm of T. K. & P. G. C., payable four months from date, to be given at the end of each and every month, for the amount of paper then delivered under this agreement.

Witness the said parties at Philadelphia, this ——— day of ———, A. D., one thousand eight hundred and fifty—.

Witnesses present, }
 H. E. W. }
 D. J. K. }

C. M.
 T. K. C

II. A Bill of Sale of Goods.

KNOW ALL MEN BY THESE PRESENTS, that I, A. B. of ———, Merchant, for and in consideration of the sum of five hundred dollars to me in hand paid by C. D. of the same place, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained, sold, and delivered, and by these presents, do bargain, sell, and deliver unto the said C. D. (*Here insert the particulars of the goods sold.*)

To HAVE AND TO HOLD the said goods unto the said C. D., his executors, administrators and assigns, to his and their own

proper use and benefit forever. And I, the said A. B., for myself and my heirs, executors, and administrators, will warrant and defend the said bargained premises unto the said C. D., his executors, administrators, and assigns, from and against all persons whomsoever.

In witness whereof, &c.

Sealed and delivered in the
presence of }
J. C.

III. Bill of Sale of a Horse with Warranty.

Know all Men by these Presents, &c., [as above, and after describing the horse accurately, continue.] To HAVE, AND TO HOLD the same unto the said C. D., his executors, administrators, and assigns forever. And I do hereby warrant the said horse to be sound in every respect, to be free from vice, to be well broken, and kind and gentle in single and in double harness, and under the saddle; and I covenant for myself, my heirs, executors, and administrators, with the said C. D., to warrant and defend the sale of the said horse unto the said C. D., his executors, administrators, and assigns, against all and every person and persons, lawfully claiming or to claim the same, whomsoever.

In witness whereof, &c.

INSURING GOODS

[Chap. IX., p. 213.]

I. Loss. Notice of.

I, A. B. the person insured in Policy No. ———, underwritten by the ——— Fire Insurance Company, on this ——— day of ———, do state, that, in consequence of the fire which happened on the ——— day of ———, I have sustained loss of stock to the amount of \$5000; viz.: \$3000 for goods consumed in the store named in said policy; \$1000 for goods which were

injured in the removal; and \$1000 for goods which were abstracted by the crowd assembled on the occasion and have never been recovered. The goods so abstracted and lost, consisted of ——— and the like. And I further state, that I have no other insurance directly, or indirectly, on the aforesaid property.

A. B.

Philad'a, ———, 185—. Personally appeared before me, ———, an alderman of the city of Philad'a, the aforesaid A. B., and made oath to the truth of the aforesaid statement.

When a loss occurs, "the insured should look into the conditions of his policy for direction in regard to his preliminary proofs; and by reading them he will understand what he must do *forthwith*, directly, without delay: and if he neglects, he cannot recover. The insured *must forthwith give notice thereof, &c., and as soon after as possible, they shall deliver as particular account as possible of their loss and damage as the nature of the case will admit, &c.* Such account must be *signed* and verified with their oath or affirmation, and also if required by their *books of account* and *other proper vouchers*. The *particular account* means 'an account of the loss—that is, of the thing or value lost; or of the damage, that is, of the amount of the injury sustained.' And lastly, they must *declare on oath whether any and what other insurance has been effected on the property*. In doing these there must be neither *fraud* nor *false swearing*."—*Ham*.

II. Abandonment. Notice of.

To the President, Directors, & Company of the ——— Insurance Company.

Whereas by a Policy of Insurance dated at Philadelphia, on the ——— day of ———, in the year 18—, numbered ———, you insured the sum of ——— dollars on my interest in the ship ——— (or on merchandise on board the ship ——— from Philadelphia to Liverpool,) (or on freight to be earned by the ship, ———) from Philadelphia to Liverpool,) [describing with sufficient words the subject of the Policy,] against the perils therein described; and the said ship on the voyage therein described, on or about the

—— day of —— last, has been cast away,* (*or has struck upon a rock*) or (*has run on shore at a place called ——*) and the interest so insured has thereby become, and is totally lost to me; you will therefore please take notice, that I hereby abandon to you all my right, title, interest, property and claim, in and to the said ship, (or said merchandise) (or the said freight) and every part thereof: and I demand of you the sum of —— dollars, underwritten by you upon the same as for a total loss thereof.

Philadelphia, —— 185

* In making an abandonment, the assured must assign the true cause. If he assign an insufficient cause, he is bound by it, and cannot avail himself of a subsequent event without a new abandonment. 4 Cowen, 322.

MERCANTILE PAPER.

[Chap. XI., p. 253.]

I. Promissory Note.

[Common form is given p. 236.]

II. Indorsements. Forms of

- | | |
|---|--|
| <p>1. <i>Indorsement in Blank.</i>
Samuel F. Prince.</p> <p>2. <i>Qualified Indorsement.</i>
John O. James
<i>Sans recours.</i></p> <p>3. <i>Special Indorsement, or in full.</i>
Pay Enes M. Jones or order.
S. F. Prince.</p> | <p>4. <i>Restrictive Indorsement.</i>
Pay Edward Young for my
use.
S. F. Prince.</p> <p>5. <i>Indorsement in favor of a particular person only.</i>
Pay to S. D. Burlock only.
H. G. Kern.</p> |
|---|--|

III. Judgment Note:

\$1000. For Value Received, I promise to pay to E. M. J. or order, the sum of *one thousand* dollars, thirty days after date; and I hereby nominate, constitute, and appoint the said E. M. J.

or any attorney-at-law whom he or his assigns may select, my true and lawful attorney, irrevocable, for me and in my name to appear in any Court of Record, at any time after the above promissory note becomes due and remains unpaid, and to waive all process and service thereof, and to confess judgment in favor of the holder thereof for the sum that may be due and owing thereon, with interest, costs, and waiving all errors, &c.

In witness whereof, I have hereunto set my hand and seal, at the city of ———, in the county of ———, and State of ———, this ——— day of ———, one thousand eight hundred and

ATTEST.

J. S.

J. J.

} A. B. [SEAL.]

IV. Drafts.

\$200.

Pittsburg, ———, 185

At Sight pay to the order of A. B., Two Hundred Dollars, alue received, and charge to account of

To Mr. E. F.,

Publisher, Philadelpia. }

Yours, &c.

C. D.

\$1000.

Baltimore, ———, 185

Ten Days after sight, pay to the order of A. B., One Thousand Dollars, value received, and charge the same to account of

To C. M. & Co.,

Paper Dealers, Philad'a, }

Yours, &c.,

C. D.

\$300.

Indianapolis, ———, 185

Three Months after date, pay to the order of A. B., Three Hundred Dollars, value received, and charge to account of

To Messrs. E. B. & Co.,

Publishers, Philad'a. }

Yours, &c.,

C. D.

V. Set of Exchange.

Philadelphia, ———, 185

No. 600.

Exchange for £1000.

——— after ——— of this FIRST of Exchange, (second and 30

third of same tenor and date unpaid,) pay to the order of A. B.,
One Thousand Pounds Sterling, for value received, and place
the same to account of

To E. F.
London England. }

Your obt. Servant,
C. D.

Philadelphia, ——— 185 /

No. 600.

Exchange for £1000.

——— after ——— of this SECOND of Exchange, (first and
third of same tenor and date unpaid,) pay to the order of A. B.,
One Thousand Pounds Sterling, for value received, and place
the same to account of

To E. F.
London, England. }

Your obt. Servant,
C. D.

Philadelphia, ———, 185

No. 600.

Exchange for £1000.

——— after ——— of this THIRD of Exchange, (first and
second of same tenor and date unpaid,) pay to the order of A. B.,
One Thousand Pounds Sterling, for value received, and place
the same to account of

To E. F.
London, England. }

Your obt. Servant,
C. D.

VI. Bond. Form of

KNOW ALL MEN BY THESE PRESENTS, that I, A. B., ———, in the
county of ——— and State of ———, am held and firmly
bound unto W. H. of ———, in the county of ———, and State
aforesaid, in the sum of One Thousand Dollars, [this amount is
called the penal sum, and is usually double the amount of the
real debt,] lawful money of the United States, to be paid to the
said W. H., or his certain attorney, executors, administrators or
assigns; to which payment well and truly to be made and done,
I do bind myself, my heirs, executors and administrators, and
every of them, firmly by these presents. Sealed with my seal,
and dated the ——— day of ———, Anno Domini, one thousand
eight hundred and

THE CONDITION OF THIS OBLIGATION is such, that if the above bounden A. B., his heirs, executors, administrators, or any of them, shall and do well and truly pay, or cause to be paid unto the above-named W. H., his executors, administrators or assigns, the just and full sum of five hundred dollars, lawful money aforesaid, with legal interest for the same, on or before the ——— day of ——— next, without fraud or further delay, then the above obligation to be void and of none effect, or else to be and remain in full force and virtue.

Signed, sealed and delivered in }
the presence of

A. B. [SEAL.]

[In case it is intended, that if the interest be not paid within a certain time after it is due, the whole sum, principal and interest, shall, at the option of the obligee, become due immediately, add the following clause :]

And it is hereby expressly agreed, that should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable, as above expressed, and should the same remain unpaid and in arrear for the space of *ten* days, then and from thenceforth, that is to say, after the lapse of the said *ten* days, the aforesaid principal sum of five hundred dollars, together with all arrearage of interest thereon, shall, at the option of the said W. H., his executors, administrators, and assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, any thing herein before contained to the contrary thereof in anywise notwithstanding.

And to make it a JUDGMENT BOND add the following clause :—

And I do hereby authorize and empower any attorney of any Court of Record in the State of Pennsylvania, or elsewhere, to enter judgment against me, my heirs, executors and administrators, and in favor of the above named W. H., his executors, administrators or assigns, for the above sum, as of the past, present, or any future term of said Court, with release of errors, costs of suit, &c. &

VII. Assignment of a Debt.

KNOW ALL MEN BY THESE PRESENTS, that I, A. B., of the city of ———, in the ———, and State of ———, in consideration of one thousand dollars to me in hand paid by C. D., of the same place, the receipt whereof I hereby acknowledge, have sold, transferred, and assigned unto the said C. D., a certain debt due and owing to me from John Smith, of the city of Cincinnati, in the county of Hamilton, and State of Ohio, for [*here state the consideration or cause of indebtedness,*] amounting to twelve hundred dollars.

And I do hereby authorize the said C. D., in my name or otherwise, but at his own cost, to sue for, collect, and receive, sell and transfer, settle and discharge, the said debt.

And I do covenant that the said sum of twelve hundred dollars is justly owing and due to me from the said John Smith, and that I have neither done nor will do any thing to lessen or discharge the said debt, or hinder the said C. D. or his assigns from collecting the same.

In witness whereof, &c.

8. Declaration of Indebtedness to accompany Assignment.

I, John Smith, of the city of Cincinnati, State of Ohio, do hereby declare that I have no claim of offset to make to the payment of a certain debt due by me, and owing to A. B. of ———, [*here describe indebtedness,*] but that the whole of the said sum of money with interest from ———, remains unpaid and owing by me,

JOHN SMITH.

COLLECTING DEBTS.

[Chap. XII., p. 257.]

I. Affidavit for Goods Sold and Delivered.

STATE of ———, county of ———, ss.
A. B. of ———, in said county, being duly sworn, deposes and

says that, C. D. of ———, in the county of ———, and State of ———, is justly and truly indebted unto him, this deponent, in the sum of ——— Dollars for goods sold and delivered by him to the said C. D., and that he has given credit to the said C. D. for all payments and setoffs to which he is justly entitled, and that the balance claimed is justly due, according to the foregoing account; and that said account is correctly stated.

Signed A. B.

Sworn and subscribed this ——— day of ———, A. D. 185—,
before me, H. G.,

Commissioner for the State of ———.

II. A Clerk's Affidavit for Goods Sold and Delivered.

STATE of ———, county of ———, ss.

E. F. of ———, in said county, being duly sworn, deposes and says, that C. D., in the county of ———, and State of ———, is justly indebted unto A. B. for goods sold and delivered to the said C. D., which goods were packed and delivered by this deponent. And this deponent further saith, that the account hereto annexed was duly copied from the books of the said A. B., and examined by him, this deponent, and that full credit has been given to the said C. D. for all payments and setoffs to which he is entitled, and that the balance claimed is justly due, according to the foregoing account; and that said account is correctly stated.

E. F.

Sworn and subscribed this ——— day of ——— A. D. 185—,
before me, H. G.,

Commissioner for the State of ———.

PAYMENT.

[Chap. XIV., p. 300.]

I. Receipt in full of all Demands.

Philadelphia, ——— 185—, Received of C. D. Five Hundred

30*

Dollars in full of my bill against him for ———, dated ———, 185—, and in full of all demands to this date. A. B.

II. Receipt on Account.

Philadelphia, ———, 185—, Received of C. D. One Hundred Dollars to apply on account of my bill against him, dated ———, 185—. A. B.

III. General Release of all Demands.

KNOW ALL MEN BY THESE PRESENTS, that I, A. B. of ———, for and in consideration of the sum of ———, to me paid by C. D. of ———, the receipt whereof I do hereby acknowledge, have remised, released, and forever discharged, and I do hereby, for myself, my heirs, executors, administrators, and assigns, remise, release, and forever discharge, the said C. D., his heirs, executors, and administrators, of and from all debts, demands, actions, and causes of action, in law or equity, of every kind, character, and nature soever against him, from the beginning of the world to this day.

In testimony whereof I have hereto set my hand and seal this ——— day of ——— A. B. [SEAL.]

FAILURES AND ASSIGNMENTS.

[Chap. XIII., p. 286.]

I. Assignment By Deed Poll.

A general assignment for the benefit of creditors rateably, with schedules.

KNOW ALL MEN BY THESE PRESENTS, that I, A. B. of ——— in consideration of the sum of one dollar to me paid by C. D. of ———, the receipt whereof I hereby acknowledge, and of the uses, purposes and trusts hereinafter mentioned, have granted, bargained and sold, assigned, transferred and set over, and by these presents do grant, bargain and sell, assign, transfer, and set over, unto the said C. D., his heirs and assigns, all my lands,

tenements and hereditaments, goods, chattels and effects, and all accounts, debts and demands due, owing or belonging to me, together with all securities for the same; which said lands, goods, chattels, debts and demands are particularly enumerated and described in a schedule hereunto annexed, marked "Schedule A."

TO HAVE AND TO HOLD the same, with the appurtenances, unto the said C. D., his heirs, executors, administrators and assigns :

IN TRUST, nevertheless, that the said C. D. shall forthwith take possession of the premises hereby assigned, and with all reasonable diligence sell and dispose of the same, by public or private sale, for the best price that can be obtained, and convert the same into money: and shall, as soon as possible, collect the debts, accounts, and demands aforesaid: and with and out of the proceeds of such sales and collections, after deducting and paying all reasonable costs, charges and expenses attending the execution of the trust hereby created, together with a reasonable and lawful compensation to the said C. D., shall pay to each and every of my creditors, (a full list of whom, with the amount due to each, is contained in a schedule hereunto annexed, marked "Schedule B.") the full sum that may be due and owing to them from me. And if the proceeds of the said sales and collections shall not be sufficient fully to pay and satisfy each and all of my said creditors, then the said C. D. shall, with and out of the proceeds, pay the said creditors rateably, and in proportion to the amount due and owing to each. And if, after fully paying all the said creditors, there shall be any balance or residue left of the said proceeds, the said C. D. shall pay and return the same to me, the said A. B.

And, in furtherance of the premises, I, the said A. B., do hereby make, constitute and appoint the said C. D. my true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises, and to the full execution of the said trust; and for the purposes aforesaid, to ask, demand, recover and receive of and from all and every person and persons, all the property, debts and de-

mands, due, owing and belonging to me, and to give acquittances and discharges for the same; and in default of delivery or payment in the premises, to sue, prosecute and implead for the same; and to execute, acknowledge and deliver all necessary deeds and instruments of conveyance; and also, for the purposes aforesaid, or any part thereof, to make, constitute and appoint one or more attorneys under him, and at his pleasure to revoke the same: hereby ratifying and confirming whatever my said attorney or his substitutes shall lawfully do in the premises.

In witness whereof, I have hereunto set my hand and seal, the
— day of —, in the year —

Scaled and delivered in }
presence of
E. F.

A. B. [SEAL.]

Schedule A.

Referred to in the foregoing (or Annexed) Assignment.

All that certain Messuage or dwelling-house and Lot, piece or parcel of land, situate, lying, and being on the — side of — street, between — and — streets, in the — ward of the city of — and known as No. —, — street, &c., [*describing it.*]

All that certain Lot, piece or parcel of land, situate, &c., in the town of —, county of —, and State of —, and known and described as follows, to wit: [*description.*] Subject to a mortgage, &c., to G. H. of — for Two Thousand Dollars.

Goods and Merchandise now in the store No. —, in the city of —, as follows, to wit: [*giving the items.*]

Household Furniture, now in the house No. —, street, in said city as follows, to wit: [*giving the items.*]

200 Shares Stock of the Reading Railroad Company.

A Bond executed by L. M. in my favor for \$2000

W. B. S. & Co.'s note dated April 14, 1857, 4 months, 1500

A Judgment recovered against P. Q. in the Court of

—, for

500

A claim for insurance on the Schooner Mary, lost,
 against ——— Company, \$1600
 Book Debts and balances due me as follows, [*describing*
them.]
 Dated this ——— day of ———, A. D. 185—. A. B.

Schedule B.

Referred to in the foregoing Assignment.

Promissory Notes made by A. B. to the following per-
 sons : to L. M., dated ———, at 6 months, \$1000
 To R. S. & Co., of New York, dated ———, at 4 months,
 indorsed by X. Y. 600
 A Judgment obtained by J. K. against A. B. in the
 Court of ———, 930
 Balance due on a Due Bill of \$600 given by A. B. to
 J. K. F. for goods, 350
 Book Debts due the following persons, [*giving the items.*]
 Dated the ——— day of ———, A. D. 185—. A. B.

II. Assignment by Indenture Bipartite.

*A general assignment of real and personal property, for the benefit
 of creditors rateably, with schedules.*

THIS INDENTURE, made the ——— day of ———, in the year
 one thousand eight hundred and ———, between A. B. of
 [the city of ———, merchant,] of the first part, and C. D. of
 [the said city, counselor at law,] of the second part : WHEREAS
 the said party of the first part is indebted to divers persons in
 divers sums of money, which by reason of sundry losses and
 misfortunes, he has become unable fully to pay, and is desirous of
 providing for the payment thereof, by an assignment of all his
 property and effects for that purpose :

NOW, THIS INDENTURE WITNESSETH, that the said party of the
 first part, in consideration of the premises, and of the sum of
 one dollar to him in hand paid by the said party of the second

part, at or before the en sealing and delivery of these presents, the receipt whereof is hereby acknowledged, *hath* granted, bargained, sold, assigned, transferred, and set over, and by these presents *doth* grant, bargain, sell, assign, transfer and set over, unto the said party of the second part, his heirs, executors, administrators and assigns, *All* and singular the lands, tenements, hereditaments and appurtenances, goods, chattels, stocks, promissory notes, debts, choses in action, claims, demands, property and effects of every description, belonging to the said party of the first part, or in which he has any right or interest whatsoever; the same being more fully and particularly enumerated and described in a schedule thereof hereto annexed, marked "Schedule A."

To HAVE AND TO HOLD the same, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs, executors, administrators and assigns :

IN TRUST, nevertheless, and to and for the uses, intents and purposes following, that is to say :

First, to take possession of the said property hereby assigned, and to sell and dispose of the same, with all convenient diligence, either at public or private sale, and for the best prices that can be obtained therefor, and to convert the same into money: and to collect all such debts and demands as may be collectable. And with and out of the proceeds of such sales and collections,

Secondly, to pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, together with a reasonable commission or compensation to the said party of the second part, for his own services in executing the said trust. And out of the residue of the proceeds of said sales and collections.

Thirdly, to pay and discharge in full, if there be sufficient for that purpose, all the debts and liabilities now due, or to become due, from the said party of the first part, and which are particularly enumerated and described in a schedule thereof, hereto

annexed, marked "Schedule B.," together with all interest moneys due and to grow due thereon. And if there be not sufficient of said proceeds to pay the said debts and liabilities in full then to apply the same, *pro ratâ*, so far as they will extend, to the payment of the said debts and liabilities, according to their respective amounts. And if, after payment of all the costs, charges and expenses attending the execution of the said trust, and the payment and discharge in full of all the lawful debts owing by the said party of the first part, of any and every description, there should be a surplus of the said proceeds remaining in the hands of the said party of the second part; then, *Lastly*, to pay over and return the same to the said party of the first part, his executors, administrators or assigns.

And for the better and more effectual execution of these presents, and of the trusts hereby created and reposed, the said party of the first part doth hereby make, constitute and appoint the said party of the second part, his true and lawful *attorney* irrevocable, with full power and authority to do, transact, and perform all acts, deeds, matters and things which may be necessary in the premises, and to the full execution of the said trust; and, for the purposes of said trust, to ask, demand, recover, and receive of and from all and every person and persons, all the property, debts and demands belonging and owing to the said party of the first part, and to give acquittances and discharges for the same; and to sue, prosecute, defend and implead for the same; and to execute, acknowledge and deliver all necessary deeds and instruments of conveyance; and also for the purposes aforesaid, or any part thereof, to make, constitute and appoint one or more attorneys under him, and at his pleasure to revoke the same. Hereby ratifying and confirming whatever the said party of the second part, or his substitutes, shall lawfully do in the premises.

And the said party of the second part doth hereby accept the trust created and in him reposed by these presents; and doth, for himself, his heirs, executors and administrators, hereby covenant and agree to and with the said party of the first part, his

executors, administrators and assigns, that he the said party of the second part will honestly and faithfully, and without delay, execute the same according to the best of his skill, knowledge and ability.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in }
the presence of }

A. B. [SEAL.]
C. D. [SEAL.]

R. F.

G. H.

III. Assignment Giving Preferences.

[The commencement and recital may be the same as in the preceding form to the words "And out of the residue of the proceeds of said sales and collections," for which substitute the following :]

And with and out of the residue or net proceeds of such sales and collections, the said party of the second part shall pay and discharge the debts due and owing by the said party of the first part, in the order and manner following, that is to say :

First, the said party of the second part shall pay all and singular the debts set forth and enumerated in a schedule of debts, hereto annexed, marked "Schedule B;" and designated in said schedule as *class number one*; the same to be paid in full, with lawful interest, if the said proceeds shall be sufficient for that purpose; and if the same be not sufficient, then the said party of the second part shall apply the said net proceeds to and in the payment of the said debts, rateably, and in proportion to the respective amounts thereof.

Secondly, after the payment in full of all the debts designated, in said Schedule B, as *class number one*, in manner above directed, the said party of the second part shall pay in full all and singular the debts enumerated and designated in said Schedule B, as *class number two*, if there be sufficient of the said net proceeds remaining in his hands for that purpose; and if

there be not sufficient, then the said party of the second part shall apply the same, so far as they will go for that purpose, to and in the payment of the said last-mentioned debts, rateably, and in proportion to the respective amounts thereof.

Thirdly, after the payment in full of all the debts designated in said Schedule B, as class number two, if there should be any residue or surplus of the said net proceeds remaining in his hands, the said party of the second part shall, with and out of the said residue, pay in full all and singular the debts enumerated and designated in said Schedule B, *as class number three*, if there be sufficient of said residue for that purpose; and if there be not sufficient, then the said party of the second part shall apply the said residue to and in the payment of the said last-mentioned debts, rateably, and in proportion to the respective amounts thereof.

Fourthly, after the payment in full of all the debts designated in said Schedule B, as class number three, in manner above directed, the said party of the second part shall use and apply the rest and residue of the said net proceeds, if any there be, in and toward the payment of all the debts designated, in said Schedule B, *as class number four*, equally and rateably, and without distinction or preference.

Lastly, after the payment of all the costs, charges and expenses attending the execution of the trust hereby created, and the payment and discharge in full of all the lawful debts due and owing by the said party of the first part, of any and every kind and description, if any part or portion of the proceeds of said sales and collections shall remain in the hands or control of the said party of the second part, his executors, administrators or assigns, he or they shall pay and return the same to the said party of the first part, his executors, administrators or assigns. And if, after payment in full of all the said debts, there should remain in the hands or possession of the said party of the second part, his executors, administrators or assigns, any part or portion of the property and effects hereby assigned, which shall not have been sold, collected or converted into money, he

or they shall return, re-assign and re-deliver the same to the said party of the first part, his heirs, executors, administrators or assigns.

[*Power of Attorney and conclusion, the same as in preceding form.*]

Schedule A.

Referred to in foregoing Assignment.

[As Schedule A, before given.]

Schedule B.

Referred to in the foregoing Assignment.

Class Number One.

S. F. P., money deposited by him as per receipt, \$1200

E. F., money collected for her from the estate of
J. D., dec'd, 800

Class Number Two

H. P. R., money borrowed of him as per Due Bill
dated ———, 1000

J. G., money received for him as per receipt, 500

Class Number Three.

E. L., indorsement of A. B.'s note, dated and held
by S. T. 1500

Class Number Four.

[*Description by Items as above.*]

Dated ——— day of ———, 185—.

A. B.

WILLS AND TESTAMENTS.

[Chap. XV., p. 311.]

[The following, being one of the most important Wills on record, will serve ~~us~~ as a form for ordinary and extraordinary bequests :]

The Will of Stephen Girard, Philadelphia.

I, STEPHEN GIRARD, of the city of Philadelphia, in the Commonwealth of Pennsylvania, mariner and merchant, being of sound mind, memory, and understanding; do make and publish this my last Will and Testament, in manner following; that is to say :—

I. I give and bequeath unto the "Contributors to the Pennsylvania Hospital," of which Corporation I am a member, the sum of Thirty Thousand Dollars, upon the following conditions, namely, that the said sum shall be added to their capital, and shall remain a part thereof forever, to be placed at interest, and the interest thereof to be applied, in the first place, to pay to my black woman Hannah (to whom I hereby give her freedom,) the sum of two hundred dollars per year, in quarterly payments of fifty dollars each in advance, during all the term of her life; and, in the second place, the said interest to be applied to the use and accommodation of the sick in the said hospital, and for providing, and at all times having competent matrons, and a sufficient number of nurses and assistant-nurses, in order not only to promote the purposes of the said hospital, but to increase this last class of useful persons, much wanted in our city.

II. I give and bequeath to "The Pennsylvania Institution for the Deaf and Dumb," the sum of Twenty Thousand Dollars, for the use of that Institution.

III. I give and bequeath to "The Orphan Asylum of Phila-
(879)

delphia," the sum of Ten Thousand Dollars, for the use of that Institution.

IV. I give and bequeath to "The Comptrollers of the Public Schools for the City and County of Philadelphia," the sum of Ten Thousand Dollars, for the use of the Schools upon the Lancaster system, in the first section of the first school district of Pennsylvania.

V. I give and bequeath to "The Mayor, Aldermen, and Citizens of Philadelphia," the sum of Ten Thousand Dollars, in trust, safely to invest the same in some productive fund, and with the interest and dividends arising therefrom, to purchase fuel between the months of March and August in every year forever, and in the month of January in every year forever, distribute the same amongst poor white housekeepers and room-keepers, of good character, residing in the city of Philadelphia.

VI. I give and bequeath to the Society for the Relief of poor and distressed Masters of Ships, their Widows and Children, (of which Society I am a member,) the sum of Ten Thousand Dollars, to be added to their capital stock, for the uses and purposes of said Society.

VII. I give and bequeath to the gentlemen who shall be Trustees of the Masonic Loan, at the time of my decease, the sum of Twenty Thousand Dollars, including therein ten thousand nine hundred dollars due to me, part of the Masonic Loan, and any interest that may be due thereon at the time of my decease, in trust for the use and benefit of "The Grand Lodge of Pennsylvania, and Masonic Jurisdiction thereto belonging," and to be paid over by the said Trustees to the said Grand Lodge, for the purpose of being invested in some safe stock or funds, or other good security, and the dividends and interest arising therefrom to be again so invested and added to the capital, without applying any part thereof to any other purpose, until the whole capital shall amount to thirty thousand dollars, when the same shall forever after remain a permanent fund or capital, of the said amount of thirty thousand dollars, the interest whereof shall be applied from time to time to the

relief of poor and respectable brethren ; and in order that the real and benevolent purposes of Masonic institutions may be attained, I recommend to the several lodges not to admit to membership, or to receive members from other lodges, unless the applicants shall absolutely be men of sound and good morals.

VIII. I give and bequeath unto Philip Peltz, John Lentz, Francis Hesley, Jacob Baker, and Adam Young, of Passyunk township, in the county of Philadelphia, the sum of Six Thousand Dollars, in trust, that they or the survivors or survivor of them shall purchase a suitable piece of ground, as near as may be in the centre of said township, and thereon erect a substantial brick building, sufficiently large for a school-house and the residence of a school-master, one part thereof for poor male white children, and the other part for poor female white children of said township ; and as soon as the said school-house shall have been built, that they the said trustees or the survivors or survivor of them, shall convey the said piece of ground and house thereon erected, and shall pay over such balance of said sum as may remain unexpended to any board of directors and their successors in trust, which may at the time exist or be by law constituted, consisting of at least twelve discreet inhabitants of the said township, and to be annually chosen by the inhabitants thereof ; the said piece of ground and house to be carefully maintained by said directors and their successors, solely for the purpose of a school as aforesaid forever, and the said balance to be securely invested as a permanent fund, the interest thereof to be applied from time to time toward the education in the said school of any number of such poor white children of said township ; and I do hereby recommend to the citizens of said township to make addition to the fund whereof I have laid the foundation.

IX. I give and devise my house, and lot of ground thereto belonging, situate in rue Ramonet aux Chartrons, near the city of Bordeaux, in France, and the rents, issues, and profits thereof, to my brother Etienne Girard, and my niece Victoire Fenellon, (daughter of my late sister Sophia Girard Capayron, both re-

siding in France,) in equal moieties, for the life of my said brother, and on his decease, one moiety of the said house and lot to my said niece Victoire, and her heirs forever, and the other moiety to the six children of my said brother, namely, John Fabricius, Marguerite, Ann Henriette, Jean August, Marie, and Madelaine Henriette, share and share alike (the issue of any deceased child, if more than one, to take amongst them the parent's share) and their heirs forever.

X. I give and bequeath to my said brother, Etienne Girard, the sum of Five Thousand Dollars, and the like sum of Five Thousand Dollars, to each of his six children above named: if any of the said children shall die prior to the receipt of his or her legacy of five thousand dollars, the said sum shall be paid, and I give and bequeath the same to any issue of such deceased child, if more than one, share and share alike.

XI. I give and bequeath to my said niece Victoire Fenelon, the sum of Five Thousand Dollars.

[Sections XII., XIII., XIV. are bequests to other relatives.]

XV. Unto each of the Captains who shall be in my employment at the time of my decease, either in port or at sea, having charge of one of my ships or vessels, and having performed at least two voyages in my service, I give and bequeath the sum of Fifteen Hundred Dollars—provided he shall have brought safely into the port of Philadelphia, or if at sea at the time of my decease, shall bring safely into that port, my ship or vessel last entrusted to him, and also, that his conduct during the last voyage shall have been in every respect conformable to my instructions to him.

XVI. All persons, who, at the time of my decease, shall be bound to me by indenture, as apprentices or servants, and who shall then be under age, I direct my executors to assign to suitable masters immediately after my decease, for the remainder of their respective terms, on conditions as favorable as they can in regard to education, clothing, and freedom dues; to each of the said persons in my service and under age at the time of my decease, I give and bequeath the sum of Five Hundred Dollars,

which sums respectively I direct my executors safely to invest in public stock, to apply the interest and dividends thereof toward the education of the several apprentices or servants, for whom the capital is given respectively, and at the termination of the apprenticeship or service of each, to pay to him or her the said sum of five hundred dollars and any interest accrued thereon, if any such interest shall remain unexpended; in assigning any indenture, preference shall be given to the mother, father, or next relation as assignee, should such mother, father, or relative desire it, and be at the same time respectable and competent.

XVII. I give and bequeath to Francis Hesley, (son of Mrs. S. Hesley, who is mother of Marianne Hesley,) the sum of One Thousand Dollars, over and above such sum as may be due to him at my decease.

[Section XVIII. Charges his real estate in Pennsylvania with several annuities, ranging from \$300 to \$1000.]

XIX. All that part of my real and personal estate, near Washita, in the State of Louisiana, the said real estate consisting of upward of two hundred and eight thousand arpens, or acres of land, and including therein the settlement hereinafter mentioned, I give, devise, and bequeath as follows, namely: 1. I give, devise, and bequeath to the Corporation of the City of New Orleans, their successors and assigns, all that part of my real estate, constituting the settlement formed on my behalf by my particular friend, Judge Henry Bree, of Washita, consisting of upward of one thousand arpens, or acres of land, with the appurtenances and improvements thereon, and also all the personal estate thereto belonging, and thereon remaining, including upward of thirty slaves now on said settlement, and their increase, in trust, however, and subject to the following reservations:

I desire that no part of the said estate or property, or the slaves thereon, or their increase, shall be disposed of or sold for the term of twenty years from and after my decease, should the said Judge Henry Bree survive me and live so long, but that the said settlement shall be kept up by the said Judge Henry Bree, for and during said term of twenty years, as if it was his

own; that is, it shall remain under his sole care and control, he shall improve the same by raising such produce as he may deem most advisable, and after paying taxes, and all expenses in keeping up the settlement, by clothing the slaves and otherwise, he shall have and enjoy for his own use all the net profits of said settlement. Provided, however, and I desire that the said Judge Henry Bree shall render annually to the Corporation of the City of New Orleans, a report of the state of the settlement, the income and expenditure thereof, the number and increase of the slaves, and the net result of the whole. I desire that, at the expiration of the said term of twenty years, or on the decease of the said Judge Henry Bree, should he not live so long, the lands and improvements forming said settlement, the slaves thereon, or thereto belonging, and all other appurtenant personal property, shall be sold, as soon as the said Corporation shall deem it advisable to do so, and the proceeds of the said sale or sales shall be applied by the said Corporation to such uses and purposes as they shall consider most likely to promote the health and general prosperity of the inhabitants of the city of New Orleans. But, until the said sale shall be made, the said Corporation shall pay all taxes, prevent waste, or intrusion, and so manage the said settlement and the slaves, and their increase thereon, as to derive an income, and the said income shall be applied, from time to time, to the same uses and purposes for the health and general prosperity of the said inhabitants.

2. I give, devise, and bequeath to the Mayor, Aldermen, and citizens of Philadelphia, their successors and assigns, two undivided third parts of all the rest and residue of my said real estate, being the lands unimproved near Washita, in the said State of Louisiana, in trust, that, in common with the corporation of the city of New Orleans, they shall pay the taxes on the said lands, and preserve them from waste and intrusion, for the term of ten years, from and after my decease, and, at the end of the said term, when they shall deem it advisable to do so, shall sell and dispose of their interest in said lands gradually from time to time, and apply the proceeds of such sales to the

same uses and purposes hereinafter declared and directed, of and concerning the residue of my personal estate.

3. And I give, devise, and bequeath to the corporation of the city of New Orleans, their successors and assigns, the remaining one undivided third part of the said lands, in trust, in common with the Mayor, Aldermen, and citizens of Philadelphia, to pay the taxes on the said lands, and preserve them from waste and intrusion, for the term of ten years from and after my decease; and at the end of the said term, when they shall deem it advisable to do so, to sell and dispose of their interest in said lands gradually from time to time, and to apply the proceeds of such sales to such uses and purposes as the said corporation may consider most likely to promote the health and general prosperity of the inhabitants of the city of New Orleans.

XX. And whereas, I have been for a long time impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles above the many temptations to which, through poverty and ignorance, they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education, as well as a more comfortable maintenance, than they usually receive from the application of the public funds; and whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior. Now, I do give, devise and bequeath all the residue and remainder of my Real and Personal Estate of every sort and kind wheresoever situate, (the real estate in Pennsylvania charged as aforesaid) unto "the Mayor, Aldermen, and citizens of Philadelphia," their successors and assigns, in trust, to and for the several uses, intents, and purposes hereinafter mentioned and declared of and concerning the same, that is to say: So far as regards my real estate in Pennsylvania, in

trust, that no part thereof shall ever be sold or alienated by the said Mayor, Aldermen, and citizens of Philadelphia, or their successors, but the same shall forever thereafter be let from time to time, to good tenants, at yearly, or other rents, and upon leases in possession not exceeding five years from the commencement thereof, and that the rents, issues, and profits arising therefrom shall be applied toward keeping that part of the said real estate, situate in the city and liberties of Philadelphia, constantly in good repair, (parts elsewhere situate to be kept in repair by the tenants thereof respectively) and toward improving the same, whenever necessary, by erecting new buildings, and that the net residue, (after paying the several annuities hereinbefore provided for) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate:—And so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Burmley, in trust, to sell and dispose of the same, whenever it may be expedient to do so, and to apply the proceeds of such sale to the same uses and purposes as are herein declared of and concerning the residue of my personal estate.

XXI. And so far as regards the residue of my personal estate, in trust, as to Two Millions of Dollars, part thereof to apply and expend so much of that sum as may be necessary—in erecting, as soon as practicably may be, in the centre of my square of ground between High and Chestnut streets, and Eleventh and Twelfth streets, in the city of Philadelphia, (which square of ground I hereby devote for the purposes hereinafter stated, and for no other forever,) a permanent college, with suitable outbuildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established: and in supplying the said college and outbuildings with decent and suitable furniture, as well as books and all things needful to carry into effect my general design.

The said college shall be constructed with the most durable materials and in the most permanent manner avoiding needless

ornament, and attending chiefly to the strength, convenience, and neatness of the whole: it shall be at least one hundred and ten feet east and west, and one hundred and sixty feet north and south, and shall be built on lines parallel with High and Chestnut streets, and Eleventh and Twelfth streets, provided those lines shall constitute, at their junction, right angles: it shall be three stories in height, each story at least fifteen feet high in the clear from the floor to the cornice; it shall be fire-proof inside and outside.

[Here follows a minute description of the mode in which the building shall be constructed.]

When the college and appurtenances shall have been constructed, and supplied with plain and suitable furniture and books, philosophical and experimental instruments and apparatus, and all other matters needful to carry my general design into execution; the income, issues and profits of so much of the said sum of two millions of dollars as shall remain unexpended; shall be applied to maintain the said college, according to my directions.

1. The institution shall be organized as soon as practicable, and to accomplish that purpose more effectually, due public notice of the intended opening of the college shall be given—so that there may be an opportunity to make selections of competent instructors, and other agents, and those who may have the charge of orphans, may be aware of the provisions intended for them.

2. A competent number of instructors, teachers, assistants, and other necessary agents, shall be selected, and when needful, their places from time to time supplied; they shall receive adequate compensation for their services: but no person shall be employed who shall not be of tried skill in his or her proper department, of established moral character; and in all cases persons shall be chosen on account of their merit, and not through favor or intrigue.

3. As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain,

shall be introduced into the college as soon as possible; and from time to time as there may be vacancies, or as increased ability from income may warrant, others shall be introduced.

4. On the application for admission, an accurate statement should be taken in a book prepared for the purpose, of the name, birth-place, age, health, condition as to relatives, and other particulars useful to be known of each orphan.

5. No orphan should be admitted until the Guardians or Directors of the Poor, or a proper guardian, or other competent authority, shall have given, by indenture, relinquishment or otherwise, adequate power to the Mayor, Aldermen, and Citizens of Philadelphia, or to directors, or others by them appointed, to enforce, in relation to each orphan, every proper restraint, and to prevent relatives or others from interfering with, or withdrawing such orphans from the institution.

6. Those orphans, for whose admission application shall first be made, shall be first introduced, all other things concurring—and at all future times, priority of application shall entitle the applicant to preference in admission, all other things concurring; but if there shall be at any time, more applicants than vacancies, and the applying orphans shall have been born in different places, a preference shall be given—*first*, to orphans born in the city of Philadelphia; *secondly*, to those born in any other part of Pennsylvania; *thirdly*, to those born in the city of New York, (that being the first port on the continent of North America at which I arrived;) and *lastly*, to those born in the city of New Orleans, (being the first port of the said continent at which I first traded, in the first instance as first officer, and subsequently as master and part owner of a vessel and cargo.)

7. The orphans admitted into the college, shall be there fed with plain but wholesome food, clothed with plain but decent apparel, (no distinctive dress ever to be worn,) and lodged in a plain but safe manner. Due regard shall be paid to their health, and to this end their persons and clothes shall be kept clean, and they shall have suitable and rational exercise and recreation. They shall be instructed in the various branches of a sound edu-

cation, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the French and Spanish languages, (I do not forbid, but I do not recommend the Greek and Latin languages)—and such other learning and science as the capacities of the several scholars may merit or warrant: I would have them taught facts and things, rather than words or signs. And, especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitution, shall be formed and fostered in the minds of the scholars.

8. Should it unfortunately happen, that any of the orphans, admitted into the college, shall, from misconduct, have become unfit companions for the rest, and mild means of reformation prove abortive, they should no longer remain therein.

9. Those scholars, who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age; they shall then be bound out by the Mayor, Aldermen, and Citizens of Philadelphia, or under their direction, to suitable occupations, as those of agriculture, navigation, arts, mechanical trades, and manufactures, according to the capacities and acquirements of the scholars respectively, consulting, as far as prudence will justify it, the inclinations of the several scholars, as to the occupation, art, or trade, to be learned.

In relation to the organization of the College and its appendages, I leave, necessarily, many details to the Mayor, Aldermen, and Citizens of Philadelphia, and their successors; and I do so, with the more confidence, as from the nature of my bequests, and the benefits to result from them, I trust that my fellow-citizens of Philadelphia, will observe and evince special care and anxiety in selecting members for their City Councils, and other agents.

There are, however, some restrictions, which I consider it my duty to prescribe, and to be, amongst others, conditions on which

my bequest for said college is made and to be enjoyed, namely : *first*, I enjoin and require, that, if at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but, in no event, shall any part of the said capital be sold, disposed of, or pledged, to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof, exclusively : *secondly*, I enjoin and require that no ecclesiastic, missionary or minister, of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purpose of the said college. In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars, the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence toward their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.

If the income arising from that part of the said sum of two millions of dollars, remaining after the construction and furnishing of the college and outbuildings, shall, owing to the increase of the number of orphans applying for admission, or other cause, be inadequate to the construction of new buildings, or the maintenance and education of as many orphans as may apply for admission, then such further sum as may be necessary for the

construction of new buildings and the maintenance and education of such further number of orphans, as can be maintained and instructed within such buildings as the said square of ground shall be adequate to, shall be taken from the final residuary fund, hereinafter expressly referred to for the purpose, comprehending the income of my real estate in the city and county of Philadelphia, and the dividends of my stock in the Schuylkill Navigation Company—my design and desire being, that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate.

XXII. And as to the further sum of Five Hundred Thousand Dollars, part of the residue of my personal estate, in trust, to invest the same securely, and to keep the same so invested, and to apply the income thereof exclusively to the following purposes: that is to say—

1. To lay out, regulate, curb, light, and pave a passage or street, on the east part of the city of Philadelphia, fronting the Delaware, not less than twenty-one feet wide, and to be called Delaware Avenue, extending from South or Cedar street, all along the east part of Water street squares, and the west side of the logs, which form the heads of the docks, or thereabouts; and to this intent to obtain such Acts of Assembly, and to make such purchases or agreements, as will enable the Mayor, Aldermen and Citizens of Philadelphia, to remove or pull down all the buildings, fences, and obstructions which may be in the way, and to prohibit all buildings, fences, or erections of any kind, to the eastward of said Avenue; to fill up the heads of such of the docks as may not afford sufficient room for the said street; to compel the owners of wharves to keep them clean and covered completely with gravel or other hard materials, and to be so leveled that water will not remain thereon after a shower of rain; to completely clean, and keep clean, all the docks within the limits of the city, fronting on the Delaware; and to pull down all platforms carried out, from the east part of the city over the river Delaware on piles or pillars.

2. To pull down and remove all wooden buildings, as well as those made of wood and other combustible materials, as those called brick-paned, or frame buildings filled in with bricks, that are erected within the limits of the city of Philadelphia, and also to prohibit the erection of any such building within the said city's limits at any future time.

3. To regulate, widen, pave, and curb Water street, &c., [citing other matters for the improvement of the Delaware Front of Philadelphia.]

XXIII. I give and bequeath to the Commonwealth of Pennsylvania, the sum of Three Hundred Thousand Dollars, for the purpose of internal improvement by canal navigation, to be paid into the State Treasury by my executors, as soon as such laws shall have been enacted by the constituted authorities of the said Commonwealth as shall be necessary, and amply sufficient to carry into effect, or to enable the constituted authorities of the city of Philadelphia to carry into effect, the several improvements above specified; namely, 1. Laws, to cause Delaware Avenue, as above described, to be made, paved, curbed and lighted; to cause the buildings, fences, and other obstructions now existing to be abated and removed; and to prohibit the creation of any such obstructions to the eastward of said Delaware Avenue; 2. Laws, to cause all wooden buildings as above described to be removed, and to prohibit their future erection within the limits of the city of Philadelphia; 3. Laws, providing for the gradual widening, regulating, paving, and curbing Water street, as hereinbefore described, and also for the repairing the middle alleys, and introducing the Schuylkill water, and pumps, as before specified—all which objects may, I persuade myself, be accomplished on principles at once just in relation to individuals, and highly beneficial to the public: the said sum, however, not to be paid, unless said laws be passed within one year after my decease.

XXIV. And as it regards the remainder of said residue of my personal estate, in trust, to invest the same in good securities, and in like manner to invest the interest and income thereof

from time to time, so that the whole shall form a permanent fund; and to apply the income of the said fund,

1st. To the further improvement and maintenance of the aforesaid College, as directed in the last paragraph of the XX1st clause of this Will:

2d. To enable the Corporation of the City of Philadelphia to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, including a sufficient number of watchmen, really suited for the purpose; and to this end, I recommend a division of the city into watch districts, or four parts, each under a proper head, and that at least two watchmen shall, in each round or station, patrol together.

3d. To enable the said Corporation to improve the city property, and the general appearance of the city itself, and, in effect, to diminish the burden of taxation, now most oppressive, especially on those who are the least able to bear it:—

To all which objects, the prosperity of the city, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year forever, after providing for the college as herein before directed, as my primary object. But, if the said city shall knowingly and willfully violate any of the conditions herein before and hereinafter mentioned, then I give and bequeath the said remainder and accumulations to the Commonwealth of Pennsylvania, for the purposes of internal navigation; excepting, however, the rents, issues and profits of my real estate in the city and county of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid college, in the manner specified in the last paragraph of the XX1st clause of this Will. And if the Commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes beforementioned, or shall apply any part thereof to any other use, or shall, for the term of one year, from the time of my decease, fail or omit to pass the laws hereinbefore specified for promoting the improvement of the city of Philadelphia, then I give, devise, and

bequeath the said remainder and accumulations (the rents aforesaid always excepted and reserved for the college as aforesaid) to the United States of America, for the purposes of internal navigation, and no other.

Provided, nevertheless, and I do hereby declare, that all the preceding bequests and devises of the residue of my estate to the Mayor, Aldermen, and Citizens of Philadelphia, are made upon the following express conditions, that is to say: *First*, that none of the moneys, principal, interest, dividends, or rents, arising from the said residuary devise and bequest, shall at any time be applied to any other purpose or purposes whatever, than those herein mentioned and appointed: *Second*, that separate accounts, distinct from the other accounts of the Corporation, shall be kept by the said Corporation, concerning the said devise, bequest, college, and funds, and of the investment and application thereof; and that a separate account or accounts of the same shall be kept in bank, not blended with any other account, so that it may at all times appear on examination by a committee of the Legislature, as hereinafter mentioned, that my intentions had been fully complied with: *Third*, That the said Corporation render a detailed account annually, in duplicate, to the Legislature of the Commonwealth of Pennsylvania, at the commencement of the session, one copy for the Senate, and the other for the House of Representatives, concerning the said devised and bequeathed estate, and the investment and application of the same, and also a report in like manner of the state of the said college, and shall submit all their books, papers, and accounts touching the same, to a committee or committees of the Legislature, for examination, when the same shall be required.

Fourth, the said Corporation shall also cause to be published in the month of January, annually, in two or more newspapers, printed in the city of Philadelphia, a concise but plain account of the state of the trusts, devises and bequests herein declared and made, comprehending the condition of the said college, the number of scholars, and other particulars needful to be

publicly known, for the year next preceding the said month of January, annually.

XXV. And, whereas I have executed an assignment, in trust, of my banking establishment, to take effect the day before my decease, to the intent that all the concerns thereof may be closed by themselves, without being blended with the concerns of my general estate, and the balance remaining to be paid over to my executors; Now, I do hereby direct my executors, hereinafter mentioned, not to interfere with the said trust in any way except to see that the same is faithfully executed, and to aid the execution thereof by all such acts and deeds as may be necessary and expedient to effectuate the same, so that it may be speedily closed, and the balance paid over to my executors, to go, as in my Will, into the residue of my estate: And I do hereby authorize, direct and empower the said trustees, from time to time, as the capital of the said bank shall be received, and shall not be wanted for the discharge of the debts due thereat, to invest the same in good securities in the names of my executors, and to hand over the same to them, to be disposed of according to this my Will.

XXVI. Lastly, I do hereby nominate and appoint Timothy Paxson, Thomas P. Cope, Joseph Roberts, William J. Duane, and John A. Barclay, executors of this my last Will and Testament: I recommend to them to close the concerns of my estate as expeditiously as possible, and to see that my intentions in respect to the residue of my estate are and shall be strictly complied with: and I do hereby revoke all other Wills by me heretofore made.

In witness, I, the said Stephen Girard, have to this my last Will and Testament, contained in thirty-five pages, set my hand at the bottom of each page, and my hand and seal at the bottom of this page; the said Will executed, from motives of prudence, in duplicate, this sixteenth day of February, in the year one thousand eight hundred and thirty.

STEPHEN GIRARD. [SEAL.]

Signed, sealed, published, and declared by the said Stephen Girard, as and for his last Will and Testament, in the presence of us, who have at his request hereunto subscribed our names as witnesses thereto, in the presence of the said Testator, and of each other, Feb. 16, 1830.

JOHN H. IRVIN,
SAMUEL ARTHUR,
S. H. CARPENTER,

WHEREAS, I, Stephen Girard, the Testator named in the foregoing Will and Testament, dated the sixteenth day of February, eighteen hundred and thirty, have, since the execution thereof, purchased several parcels and pieces of real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my wish and intention to pass by the said Will. Now, I do hereby republish the foregoing last Will and Testament, dated February 16, 1830, and do confirm the same in all particulars. In witness, I, the said Stephen Girard, set my hand and seal hereunto, the twenty-fifth day of December, eighteen hundred and thirty.

STEPHEN GIRARD. [SEAL.]

Signed, sealed, published, and declared by the said Stephen Girard, as and for a republication of his last Will and Testament, in the presence of us, who, at his request, have hereunto subscribed our names as witnesses thereto, in presence of the said Testator, and of each other, Dec. 25th, 1830.

JOHN H. IRVIN,
SAMUEL ARTHUR,
JNO. THOMSON.

WHEREAS, I, Stephen Girard, the Testator named in the foregoing Will and Testament, dated February 16, 1830, have, since the execution thereof, purchased several parcels and pieces of land and real estate, and built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said Will. And, whereas, in particular, I have recently purchased from Mr. William Parker, the Mansion House, outbuildings, and forty-five acres and some perches of land, called Peel Hall, on the Ridge Road, in Penn Township. Now, I declare it to be my intention, and I direct, that the orphan establishment, provided for in my said Will, instead of

being built, as therein directed, upon my square of ground between High and Chestnut, and Eleventh and Twelfth streets, in the city of Philadelphia, shall be built upon the estate so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose, exclusively, in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said orphan establishment prescribed by my said Will, as to said square, shall be made and executed upon the said estate, just as if I had in my Will devoted the said estate to said purpose—consequently, the said square of ground is to constitute, and I declare it to be a part of the residue and remainder of my real and personal estate, and given and devised for the same uses and purposes as are declared in section twenty, of my Will, it being my intention that the said square of ground shall be built upon and improved in such a manner as to secure a safe and permanent income for the purposes stated in said twentieth section. In witness whereof, I, the said Stephen Girard, set my hand and seal hereunto, the twentieth day of June, eighteen hundred and thirty-one.

STEPHEN GIRARD. [SEAL.

Signed, Sealed, Published, and Declared, by the said Stephen Girard, as and for a republication of his last Will and Testament, and a further direction in relation to the real estate therein mentioned, in the presence of us, who, at his request, have hereunto subscribed our names as witnesses thereto, in the presence of the said Testator, and of each other, June 20, 1831.

S. H. CARPENTER,
L. BARDIN,
SAMUEL ARTHUR.

THE END.

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